

Essays

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ESSAYS
UPON
SEVERAL SUBJECTS
CONCERNING
BRITISH ANTIQUITIES;

VIZ.

- I. INTRODUCTION OF THE FEUDAL LAW
INTO SCOTLAND.
- II. CONSTITUTION OF PARLIAMENT.
- III. HONOUR. DIGNITY.
- IV. SUCCESSION OR DESCENT.

With an APPENDIX, upon HEREDITARY
AND INDEFEASIBLE RIGHT.

Composed *anno* MDCCXLV.

The THIRD EDITION.

With ADDITIONS and ALTERATIONS.

EDINBURGH:

Printed for A. KINCAID and J. BELL.
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E S S A Y S

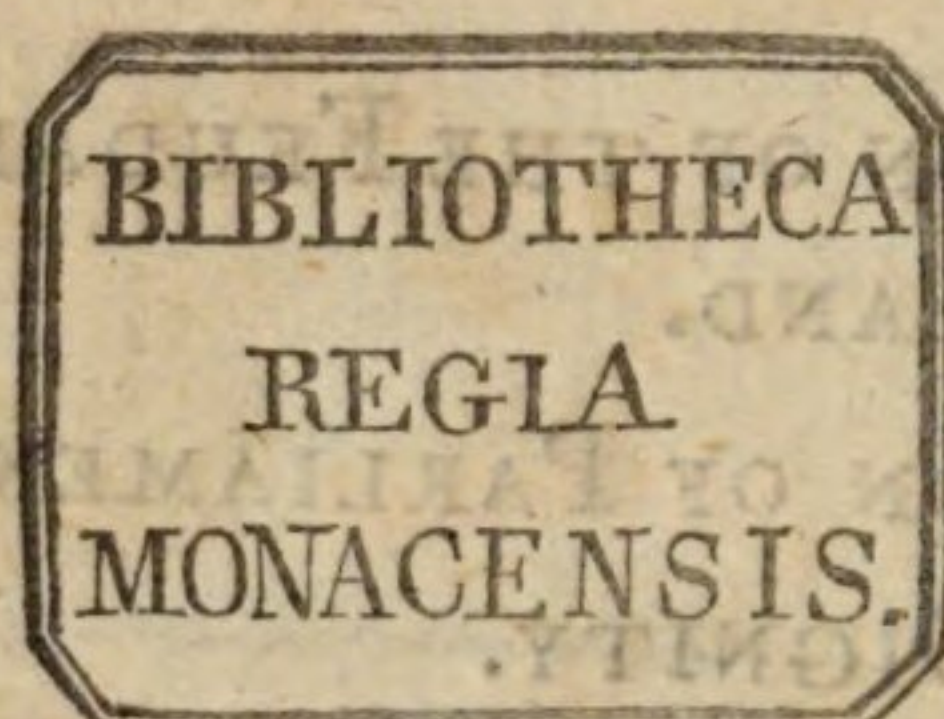
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II. Constitution of the Kingdom
III. Honours
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With an Appendix, upon Hereditary
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Printed for A. Kincaid and J. Bell,
M.D.C.C.LXXII.

INTRODUCTION.

TO our late troubles the public is indebted for the following papers, if they be of value to create a debt. After many disconsolate hours, the author took courage to think of some study, that might, in some measure, relieve his distressed mind. A connection with the cause of our violent and unhappy dissensions, led him naturally to the following speculations, which he now gives to the public; anxiously wishing to raise a spirit in his countrymen, of searching into their antiquities, those especially which regard the law and the constitution; being seriously convinced, that nothing will more contribute than this study, to eradicate a set of political opinions, which, tending to break the peace of the society, have been
pernicious

INTRODUCTION.

pernicious to this island. If these papers have the effect intended, it is well: if not, they may at least serve to bear testimony of some degree of firmness in the author, who, amidst the calamities of a civil war, gave not his country for lost; but, trusting to a good cause, and to the prevalence of good sense among his countrymen, was able to compose his mind to study, and to deal in speculations, which are not commonly relished, but in times of the greatest tranquillity.

Edinburgh,
Nov. 10. 1746.

HENRY HOME.

ESSAYS

ESSAYS

CONCERNING

BRITISH ANTIQUITIES.

ESSAY I.

OF THE INTRODUCTION OF THE FEUDAL LAW INTO SCOTLAND.

THE introduction of the Feudal law into Scotland is an event, which makes not such a figure in our history as it ought to do: it is mentioned indeed by most of our historians; but drily, and cursorily, as if it were an ordinary incident. And yet, according to the account given of it, it appears to be a singular revolution, for which no adequate cause is assigned. If credit can be given to history or tradition, we were once a free people; nay, we are reported to have been fierce
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and untamed, our nobles of great power, and generally too mighty for the sovereign. Now, as it is the plan of the Feudal law, to bestow the whole land-property upon the king, and to subject to him the bulk of the people, in quality of servants and vassals; a constitution so contradictory to all the principles which govern mankind, can never be brought about, one should imagine, but by foreign conquest, or native usurpation. Yet neither of these causes is assigned by our authors, nor will the history of Scotland admit of such suppositions: for no period can be assigned, during which the Feudal law might have been introduced, where there are any traces of conquest, or of military power, sufficient to enforce so unnatural a constitution.

All our historians are agreed, that this revolution happened in the reign of Malcolm II.; and they are also pretty much agreed about the cause. This king had been engaged in a fierce war with the Danes, which, after various fortune, ended in the expulsion of the invaders. Many of the nobles

nobles having, upon this occasion, exerted singular fidelity and valour, the king, it is said, divided the crown-lands among them. And the following particular circumstance is added, That the king retained no land to himself, but the Mute-hill in the town of Scoon. A very extensive and unprecedented liberality! But what follows is still less credible, *viz.* That the lords, to testify their gratitude, gave and granted to their sovereign, and to his heirs for ever, the ward and relief of their lands, with the marriage of their heirs. This is in effect saying, That the lords submitted their lands to the Feudal yoke; or, in other words, That all the lands in Scotland were surrendered to the king as his property; that all the great men came under personal obligations to be his servants and vassals, holding only the possession of the lands, which they had surrendered, for sustenance of themselves and their people, ready upon all occasions to fight his battles; for so much is implied in the Feudal system. No returns of gratitude are too great for some individuals; but such returns from a whole nation, without

exception, are far beyond the reach of belief. I should be shocked at such liberty of fiction in a romance. Therefore, as the foregoing account of the matter is utterly improbable, the design of this essay is, to collect some circumstances whence probable conjectures may be formed, at what time, and by what means, the Feudal law was introduced into Scotland. I shall first endeavour to settle the time of introduction, as it may give light to the other branch of the disquisition; and, notwithstanding the concurring testimonies of all our historians, I cannot help doubting, whether the Feudal law was introduced into Scotland so early as the reign of Malcolm II. What to me brought this point first under suspicion, is a fact that can be made extremely evident. When one dives into the antiquities of this island, it will appear, that we borrowed all our laws and customs from the English. No sooner is a statute enacted in England, but, upon the first opportunity, it is introduced into Scotland; and accordingly our oldest statutes are mere copies of theirs. Let the *Magna Charta* be put into the hands of any Scotchman,

Scotchman, ignorant of its history, and he will have no doubt that he is reading a collection of Scotch statutes or regulations. Now, it is a point settled among the best English antiquaries, that the Feudal law was introduced into England by William the Conqueror. This is made evident by the accurate Spelman, and by our countryman Craig. From these two facts, a strong presumption arises, that the Feudal law made its progress from England to this country. And this presumption receives additional force, when it is considered, that if we had the Feudal law before it came into England, it must have been derived from some people other than the Normans, with whom we had no intercourse. Upon that supposition, we must expect to find the Feudal customs in Scotland, after the days of William the Conqueror, differing from what they were in England; as the Feudal customs varied much in different nations. What we had in Scotland, must have been those of the country from which they were borrowed, perhaps a little varied in our practice. Yet upon inquiry, we find no such difference as

we ought to expect from the supposition. On the contrary, it may with assurance be pronounced, that the Feudal customs in England and Scotland were precisely the same, for a century or two after the days of William the Conqueror. This congruity betwixt the laws of the two countries affords evidence, as high as probability can go, either that we borrowed the Feudal law from England, or that they borrowed it from us. The latter is not maintained by any author; nor is there any foundation for the assertion, it being as well vouched as any point can be of such antiquity, that William the Conqueror brought the Feudal customs along with him from Normandy: and it is certain, he had no intercourse with Scotland, unless in the channel of enmity and war.

The circumstance now mentioned must create a suspicion, that the Feudal law is not of such antiquity in Scotland as is generally believed. But it will be said, That doubts and suspicions, however great, must yield to positive evidence; and that, besides

sides the authority of all our historians for the fact above mentioned, we have evidence still more convincing, *viz.* the laws of Malcolm II. still extant, which bear,
 “ That King Malcolm distributed all his
 “ lands in Scotland among his men; re-
 “ serving nothing in property to himself,
 “ but the royal dignity, and the Mute-hill
 “ in the town of Scoon. And all his ba-
 “ rons gave and granted to him the ward
 “ and relief of the heir of ilk baron, for
 “ the king’s sustentation.”

These authorities appearing to be of weight, shall be treated respectfully. Supposing the above-mentioned laws to be those of Malcolm II. the dispute is at an end, not only from the evidence of the foregoing passage, but also because in these laws frequent mention is made of Feudal customs, such as the office of chancery, charters, seifins, barons holding of the king, knights holding of barons, and others holding of knights, &c. But when I weigh this evidence of the antiquity of the Feudal law in Scotland, I perceive one circumstance wanting

wanting to make it complete. That these are the laws of King Malcolm cannot be denied; they have in all ages been reckoned authentic, and King Malcolm is mentioned in the body of the work: but it may be justly doubted whether they be the laws of Malcolm II. We had four kings of the name of Malcolm; and we have no authority, but from the title, to ascribe these laws to the second of that name: but at what time, or upon what evidence this title was added, we are altogether uncertain. The title in the printed copy is obviously a *post facto* work; for it runs thus: “The
“ laws of King Malcolm Mackenneth, se-
“ cond of that name, who was son to Ken-
“ neth the Third, and began to reign in the
“ year of the creation of the world 4974,
“ and of Christ 1004. These laws are
“ authentic,” &c. This title proves only, that Skeen, the publisher, believed these to be the laws of Malcolm II.; or rather, that finding this title in the manuscript copies, he did not take upon him to make any alteration, however sensible he might be
that

that it could have no better foundation than a vague tradition.

But I chuse not to rest upon negative arguments. There is evidence the most convincing, that Malcolm II. was not the author of these laws. This evidence is drawn from the work itself, wherein frequent mention is made of earls and barons, of the chancellor and his court, coroner, &c. none of which names, in all probability, had a being in the time of Malcolm II. The court of chancery was not known in England before William the Conqueror; and it is not probable we had it before his time. But more positively, it is a fact agreed upon by all writers, that it was Malcolm III. who created the first barons and earls. Dempster, the gravest of our antiquaries, p. 120. *Malcolmus Tertius, sublato Maccabæo tyranno, regnum legitime sibi debitum occupavit; quod ut ornaret unica cura incubuit: tunc et a prædiis nobilibus nomina quisque sumpsit, et cum magna frequensque nobilitas S. Margaretam ex Hungaria et Anglia secuta in Scotia consedisset, splendorem novo suo principatui additurus,*

additurus, Barones et Comites creavit. Before the days of Malcolm III. *Thane* was the only name in Scotland by which the nobles were distinguished. None of our historians mention the title of Baron before his time, or of Earl. All were called *Thanes*, such as, the Thane of Fife in MacBeath's time, Thane of Ross, Thane of Sutherland, Thane of Caithness, &c.; but from Malcolm Canmore's time downwards, not a word of Thane; all the great lords are either Earls or Barons. Here then the evidence is complete, that these laws are not of a more ancient standing than the reign of Malcolm Canmore; and to him therefore they must be restored: for they are the laws of one King Malcolm; and it is more probable they are his, than the laws of his great-grandson Malcolm IV. before whose time the Feudal law was certainly introduced into Scotland.

This point being discussed, the argument drawn from the authority of the historians will not appear formidable. We have no author who wrote in the days of Malcolm Canmore,

Canmore, nor for many ages after : as our histories, therefore, rest upon no better authority than tradition, it is not surprising, that an event which happened in the reign of one king, should be ascribed to a predecessor of the same name ; especially as there is a prevailing bias in most nations to carry back their antiquities as far as possible. But the matter doth not rest here ; the error of these historians may be detected from their own writings. Hector Boece, for example, who ascribes the introduction of the Feudal law, as aforesaid, to Malcolm II. adds with the same breath, that it was Malcolm II. who divided Scotland into baronies. We have therefore this author's testimony, that the same Malcolm introduced the Feudal law, who divided Scotland into baronies. This was certainly Malcolm III. And Buchanan, tho' for the most part he implicitly follows Hector Boece, yet, in his relation of the foregoing event, expresses a doubt, and inclines to think, that we had the laws of ward and relief rather from the English and Normans.

That

That I may leave nothing untouched, concerning a point of importance in the antiquities of this country, I proceed to some other considerations which I foresee may be urged to evince the great antiquity of the Feudal law in Scotland. One is made use of by the learned Craig to that very end: *Multa tamen sunt quæ me movent, ut hoc jure (sciz. Feudali) nostrates usos putem, antequam Angli eo uti cæperint. Hoc enim certissimum est, nos purius hoc jus habere quam vicinos; ut in rivulis aquarum qui quo propiores sint fonti sive scaturigini, eo sunt puriores.* This author probably had in view the Feudal customs as they subsisted in his own time; and it is very true, that in England the Feudal law began sooner to decline than it did in Scotland. Arts and industry flourished in that kingdom long before they had any life here; and I have observed elsewhere, that the strict regulations of the Feudal law are in a great measure inconsistent with the arts of peace. But if Craig had under consideration the Feudal law as it subsisted in this island for some ages after the time of William the Conqueror,

or,

or, he is undoubtedly in a mistake. The Feudal law, during that period, was precisely the same in both kingdoms, so far as we can gather, by comparing the ancient statutes and law-books of England and Scotland.

The *Regiam Majestatem*, the oldest institute we have of our laws, is generally believed to have been compiled in the reign, and by the authority of David I.: and as it contains a full and accurate system of our Feudal customs, a probable argument may be suggested from it, that the Feudal law had a beginning in Scotland before the days of Malcolm Canmore. For if the Feudal law was introduced by that king, there is no probability it should make a progress so rapid, as to furnish materials for a complete institute in the days of his son David. This is not agreeable to the natural course of things; and therefore not readily to be credited. Law is but of slow growth, especially among a rude people, more addicted to the arts of war than of peace. And yet, whatever be the æra of the *Re-*

giam Majestatem, it appears from it, that the Feudal law was brought to a considerable degree of perfection in Scotland at that time. The argument is weighty; and we must either give the Feudal law a more early date in Scotland than the reign of Malcolm Canmore, or the *Regiam Majestatem* a later date than the reign of his son David I. With regard to this matter one thing is certain, that the *Regiam Majestatem* was compiled in the reign of one of our Davids. The author, whoever he be, declares in his preface, “ That he was commanded by
 “ King David to compile this work, with
 “ the counsel and advice of the whole
 “ realm, that all the inhabitants thereof
 “ might learn and have knowledge of the
 “ same.” What remains is, to determine which of the Davids this was. If the reader will indulge a short digression, I shall make it evident, that it was David II. who reigned two centuries later than the other; the distance of whose reign from that of Malcolm Canmore, affords sufficient time for the ripening of the Feudal law. All the world know, that the Roman law, after being buried

ried in oblivion for ages, was restored in Italy by an accident. The very books of that law were understood to be lost past recovery, till a copy of the Pandects was found in the town of Amalphi, *anno* 1127, by Lotharius the Emperor, when he took that town, in the war he carried on against Roger King of Sicily and Naples. After this lucky accident, the Roman law spread so fast, that it was taught publicly at Oxford by Vaccarius about the year 1150, during the reign of King Stephen. This was as swift a progress as any science can be supposed to make; and there is no probability, therefore, that we had it in Scotland before that time, nor consequently in the reign of David I. who died in the year 1153. These facts will give light to the subject on hand. The author of the *Regiam Majestatem* appears to be well acquainted with the Civil law, and frequently appeals to it as to a known law. See *lib. 2. c. 16. § 2.* The *Regiam Majestatem*, therefore, compiled when the knowledge of the Civil law was spread through Scotland, could not have a being in the days of David I.; and conse-

quently the argument is conclusive, that it was compiled in the days of David II.

I have thus endeavoured to make out, that the foregoing remarkable revolution in our land-rights happened in the reign of Malcolm Canmore. And it must add to our conviction, that, were one reduced to a conjecture, this reign would be pitched upon before any other, for the introduction of the Feudal law. This law was brought into England by a conqueror, one at least who treated his new subjects as a conquered people. It is evident, that the possessing of land by tenure, throws great weight into the scale of royalty; and therefore it will not be surprising, that a neighbouring prince, who understood his own interest, should take the hint, and endeavour to prosecute the same measure. It must also be considered, that there never was in the reign of any of our kings, such a conflux of strangers into Scotland, as in the days of Malcolm Canmore; English especially, some of the highest rank. By them the fashion was begun of surnames, many of which remain at this day with our
most

most illustrious families. To keep pace with England, the new titles of Earls and Barons were introduced; and we may readily believe, that a politic king, who understood the arts of government, would not stop short, but endeavour also to introduce the Feudal law, which he saw would tend greatly to increase his power and authority. And the conviction founded on these circumstances becomes still more complete, when we consider, that the practice of giving charters of lands, is by our antiquaries universally ascribed to Malcolm Canmore. Many of our old families pretend to have had charters from that king, but none before his time. Now, supposing the Feudal law to have been as old in Scotland as Malcolm II. it is scarce supposable charters would be of a later date, as such writs seem to be necessarily connected with Feudal grants.

And this leads to the second branch of the inquiry, By what means, and after what manner were the nobles prevailed upon, not only to part with their lands, but

to subject themselves personally to Feudal service? However the thing might at first be disguised, the total surrender of lands to the king during the minority of an heir, and the year's rent payable at the entry of every heir, were no slight perquisites to be yielded carelessly. The matter is dark; and historians have touched it so slightly, that we have few circumstances to build conjectures upon. The story is still the more mysterious, considering the evidence we have of extravagant donations of the crown-lands by David I. in favour of the church. I cannot easily reconcile this with the story, as told, that King Malcolm gave away the whole crown-lands, reserving nothing to himself but the Mute-hill of Scoon. It is true, there might have been forfeitures in the interim; but this interim is, I am afraid, too short, to make the solution be generally relished. At the same time, King David's liberality to the church is condemned by every writer, as truly unjust with regard to his successors, who were thereby deprived of their birthright, *viz.* the patrimony of the crown; and yet the charge is scarce well founded,

founded, if in fact nothing were given away, but forfeited lands, which every king is privileged to dispose of at his pleasure.

I am not disposed to believe, that Malcolm Canmore gave away the whole crownlands, as is related. Neither am I disposed to believe, that by any means less than absolute force, would the bulk of the nation be brought to submit to an act so visibly prejudicial to them, that of surrendering their whole lands to the king, and their persons also, reserving only the usufruct, in name of wages, for services to be performed by them.

In a matter so dark and intricate, I dare venture no farther than to suggest a few conjectures. Before the Feudal law was known in Scotland, I take it for granted, that our people held their lands without writ; and that possession was the circumstance which determined the property of lands, as at this day it doth of moveables. Some traces of this we have remaining in the Orkney islands, where the Feudal law is scarce

scarce yet fully established. If instead of introducing the Feudal law all at once over the whole kingdom, it shall be supposed, that Malcolm Canmore did no more but lay the foundation of a building, which was finished by his successors, the thing will be easily credited: and touching the engines made use of, we need not be at a loss; for we are directed to them by our authors. These engines certainly were the crown-lands, a prudent distribution of which, or part of them, would go a great way to allure the nobles. No person upon whom crown-lands were bestowed, could refuse to hold them upon any conditions the king was pleased to impose. Here was a beginning given to the Feudal tenure. If the gift were considerable, the receiver could not handsomely avoid allowing his own estate to be ingrossed in the charter, supposing the thing to be demanded of him. And such stratagems would not be overlooked by an artful monarch, who had it at heart to make the Feudal law universal in his kingdom.

Malcolm

Malcolm had another engine at hand. It was this king incontrovertibly who introduced the titles of Earl and Baron. In this he had possibly a further design, than merely to emulate the splendor of a neighbouring court. Our forefathers were fond of titles, and were delighted with shew and equipage. If some were tempted by a new title to give up their independency, and to accept of their own estates as a gift from the king, holding of him by military tenure, we shall cease to wonder at the unequal purchase, when we see so many in later times renouncing their independency, and giving themselves up as slaves to a court, for ribands and garters, still more empty gewgaws, if possible, than titles of honour.

The foundation being thus happily laid, our kings had many opportunities to carry on the work. Our forefathers were a fierce and restless people; property was in a continual flux by forfeitures; and it is probable, that, first and last, the bulk of the *terra firma* of Scotland has, by that means, passed through

through the sovereign's hands. This afforded ample means of extending the Feudal law farther and farther, as care was always taken to make out gifts of forfeiture in the Feudal form.

One other cause there was of the growth of the Feudal law, which, though working silently and imperceptibly, had, I am persuaded, a more extensive effect than all the other causes combined together.

Mankind, especially in ignorant ages, are governed by custom and habit. By the growth of the Feudal law, a charter certainly came to be considered as a most solemn title to land, so as to give to possession alone, without a charter, but a slender hold of the imagination. Perhaps this had no remarkable effect with regard to old possessors. But purchasers were in a different case. Persons who give money for land, will not readily be satisfied with any title that is not of the best sort. Thus, after introducing the commerce of land, we may trust that charters were multiplied exceedingly.

ceedingly. For whatever security a family might have from a long continued possession, the notion would in time be firmly established, that there was no secure method of transferring land-property but by charter and seisin.

My conjecture, in short, is, that the Feudal law was not introduced all at once, as our authors insinuate, but by degrees. And this conjecture is supported by what I have often heard, that so late as the reign of James VI. there were landed gentlemen in Scotland who never had accepted of a charter.

If I am not deceived, this was a measure the most politic, and of the greatest forecast, that ever was contrived. It was a bold game for the king, to play away his crown-lands for a small consideration in hand; but the prospect was fair, as no constitution more firmly unites a people to their sovereign, than that introduced by the Feudal law, nor gives the sovereign such an immediate hold of the persons and property

ty of his subjects. Our historians give us to understand, that a prevailing desire to support the dignity of the crown, gave rise to the Feudal law in Scotland. I am sorry to observe, that instances of public spirit, even among individuals, are rare in our history. But I have read of no instance of an universal public spirit through a whole nation, sufficient to bring about such a revolution; one excepted, among the Lacedemonians, in the days of their king Lycurgus*.

* Nor is the evidence of this piece of history altogether above exception. Xenophon, who writes a treatise upon the Spartan government, has not a word of it.

E S S A Y II.

CONSTITUTION OF PARLIAMENT.

BY the Feudal constitutions, every superior had a jurisdiction within his own territory : his vassals were obliged to attend his courts, and it was their province to try all causes, civil and criminal, in form of a jury or assize. Such is the constitution of our county-courts to this day, held at stated times by the high sheriff, in name of the king ; the crown-vassals being all of them bound to appear under a penalty, each in the court of the county within which his lands are situated. The parliament is the king's court for the kingdom in general ; and consequently his whole vassals within the kingdom were bound to give their attendance there. The barons and freeholders attended in this capacity : the bishops, abbots, and priors, attended in the same capacity ; and if any of them held their land of a subject, they were not bound to perform this service.

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The idea of a king, where the Feudal law took place, is not that of a chief magistrate or governor, but that of a paramount superior, having the whole land-property of the nation vested in him, having his vassals attached to him by homage and fealty, and supported by him out of the produce of his lands : which makes a very strict connection and union betwixt them. The idea of a parliament, as I have said, is that of a court where all the king's vassals are obliged to attend for administering justice, and for making regulations to bind the whole society.

It was one effect of the Feudal law, to withdraw land from commerce. Land being allotted for the maintenance of servants or vassals, ready to obey their masters commands in war and peace, the superior could not sell, because the whole profits arising from the subject belonged to the vassal ; and the vassal could not sell, because he was not proprietor. This was an unnatural constitution, which could not subsist long in peaceable times. The severity of the Feudal law

law gave place by degrees to milder and more natural regulations. Land, the most desirable acquisition, was restored to commerce, and the crown-vassals, originally few in number, and possessing large territories, were greatly multiplied. Purchasers were willing to hold of the king rather than of a subject; and the king was willing to encourage this commerce, as it lessened the power of the great barons. The obliging so many small vassals to an expensive attendance in parliament, was, in time, considered as a grievance. In England this grievance was remedied, probably in the days of John, or Henry III.; for the record of that transaction is lost. The remedy was introduced with us later, and we have the record entire. By the act 101. parl. 1427, the attendance of small barons and freeholders is dispensed with, provided they send to parliament, from every shire, two or more of their number to represent them.

We followed the English so close in all their regulations concerning law and policy,

that I am persuaded our statute 1427 was copied from some English statute enacted by King John, or in the beginning of the reign of Henry III. which is now lost with the other statutes of that period. One thing is certain, that we find knights of the shire elected by the smaller crown-vassals, precisely as in Scotland, early in the reign of Henry III. But this is not all. We find by King John's charter of privileges to his English subjects, sect 17. and 18. that it was the practice in his days, to summon to parliament the greater barons by name, leaving the lesser barons and freeholders to be summoned by the sheriffs edictally, or in general terms. Here we have the lesser barons attending personally. From the reign of Henry III. downwards, the small barons and freeholders never did duty in parliament, otherwise than by sending some of their number out of each shire to represent them. This makes it evident, that the attendance of the small barons and freeholders, must in England have been dispensed with, as in Scotland, upon condition of their sending representatives. Their withdrawing

withdrawing from parliament might have been overlooked ; but so singular a regulation, as that of acting by delegates, could never have been introduced otherwise than by a statute. The thing merits attention, because it laid the foundation of a house of commons ; of which more fully afterwards.

Whether the royal boroughs were originally constituent members of the parliament, is a point much debated. It is observed,

 “ That the *Reddendo* of their charters being

 “ watching and warding only, they were

 “ not bound to give suit and presence in

 “ any of the king’s courts ; that they had

 “ a court peculiar to themselves, which

 “ was the chamberlain-ayr ; that *de facto*

 “ there is no instance of their ever appearing in a county-court, and consequently

 “ no reason to believe they appeared originally in parliament ; and that in England there is no evidence upon record,

 “ of burgeses being called to parliament,

 “ before 49th Henry III. at which time

 “ writs were directed to the sheriffs of the

“ several counties, to return the knights of
“ the shire and burgeses; whence it is
“ conjectured, that the calling of the bur-
“ geses to parliament was a politic of Si-
“ mon de Montfort, who had at that time
“ the power of the kingdom in his hands,
“ and who called the parliament 49th Hen-
“ ry III. in order to purge himself from
“ suspicions spread abroad of his intending
“ to usurp the crown.” One fact appears,
with regard to Scotland, that in a preamble
to the laws of Robert Bruce, still extant,
the whole orders are faithfully enumerated,
bishops, abbots, priors, earls, barons, and
other noblemen of the realm, without a
word of burgeses. In a preamble to the
laws of Robert III. burgeses are mentioned
for the first time; and the conjecture is,
that many of the noble families having been
extinguished, during the struggles we had
for liberty against the two Edwards of Eng-
land, King Robert Bruce, in order to re-
cruit the parliament, found it necessary to
call the royal boroughs to a participation of
the government.

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These specious facts and observations notwithstanding, I am of opinion, that the royal boroughs made originally one of the estates of parliament. What determines me to think so, are the following reasons. In the *first* place, they are the king's immediate vassals, and therefore bound to attendance equally with the barons and prelates; *suite and presence* in the superior's courts being a duty essential to every feudal holding, unless where expressly remitted. *Secondly*, Attendance in parliament, in old times, being reckoned a burden or service, by no means a privilege, the royal boroughs would not have obeyed a summons from the king, unless they had been bound by their holding; and our kings were by no means so absolute, as by their mere will to introduce a regulation of this general and important nature. And in the *third* place, Supposing the king's authority great enough to oblige the boroughs to submit to this incroachment upon their privileges, we cannot suppose a wise and just prince, like Robert Bruce, would undertake such a violent measure, not only without necessity,

but

but where a more natural remedy was at hand. For if many noble families were extinguished, their estates surely were not; which falling to the crown, by the supposition, through the failure of heirs, were an ample fund for increasing the number of crown-vassals to fill the parliament. *Lastly*, It is presumable the commerce of land had crept in before this time, and that the crown-vassals were rather more numerous than formerly. It is certain, they were so greatly multiplied the very next century, that it was thought expedient to exempt the smaller barons from their attendance.

And, in answer to what is urged on the other side, the *Reddendo* of watching and warding proves nothing; many services being due which are not expressed in the charter. Witness the common style of ward-holding, *Reddendo servitia solita et consueta*. The exemption of the royal boroughs from attending in the county-courts, has more the appearance of an objection. But this indulgence, and the having a court peculiar to themselves, viz. the chamberlain-court, will

will not infer their exemption from parliaments, where laws are made binding upon the whole kingdom; whereas judicial proceedings were the only subject-matter of chamberlain-ayrs, nothing being there transacted relating to public policy or government.

Though there is no mention of calling burgesses to the English parliament before the 49th Henry III. it appears to me a very lame inference, That the practice began at this time, when we find the records of preceding transactions so imperfect. At the same time, were these records entire, and were there no instance before that period of a writ directed to the sheriff for calling burgesses to parliament, it would not follow, that the royal boroughs were no sooner assumed as a branch of the legislature. This must be explained. It is mentioned above, to have been the practice in King John's days, to call only the greater barons by name, and to leave the lesser barons and freeholders to be summoned by the sheriffs edictally, or in general terms. Probably the
representatives

representatives from boroughs were ranked with the lesser barons, and not honoured with a personal citation. When the attendance of the smaller barons came to be dispensed with, upon their sending representatives, this change in the constitution introduced an alteration in the style of the writs directed to the sheriffs. Instead of the old form, injoining the sheriff to notify publicly the holding of the parliament, that all who were bound might attend, he was commanded specially to return two knights of the shire : this made it necessary to be equally special with regard to the representatives of the boroughs; and therefore, in the writ, he was directed to return two knights and two burgesses. This circumstance therefore proves nothing, but that in Henry III.'s time the style of the writ was changed, and made special, instead of being conceived as formerly in general terms. But further, the circumstances of the case are a strong evidence to me, that this was not the first time the attendance of the boroughs in parliament was required. Historians mention, that this parliament was called by Montfort,
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in order to purge himself of a suspicion, which was gaining ground, of his aiming at the crown. It is not said he had any peculiar connection with the boroughs, to make their presence of use to him; and unless it were in some such view, I cannot imagine, that Montfort, in such ticklish circumstances, would think of making any alteration in the constitution. At the same time, the plain and simple style of the writ proves it to have been a common and known writ of the law of England. Had any thing extraordinary been enjoined, it must have been introduced with a preamble to support the innovation; especially as this was not a matter of course, but a summons, which the boroughs were not bound to obey.

I have enlarged the more upon this point, as it tends to ascertain what was the original constitution of parliament; and to prove, that all the king's vassals, and none other, were the constituent members. As personal attendance was required, there was no place for representatives, unless from the boroughs. It would have been an hardship intolerable,

tolerable, to oblige a whole community to personal attendance; and therefore we may well suppose, that in all times this attendance has been dispensed with, upon sending a few of their number to represent them. This originally was the only representation, properly so called.

Thus we see how the small crown-vassals came to be exempted from their attendance in parliament, both in England and Scotland. In Scotland, these vassals had so little attention to the public, that, pleased with their exemption, they thought not of fulfilling the condition by sending representatives, till the regulation was enforced by a new law; of which afterwards. In England, the case probably would have been the same, but for the peculiar circumstances of the times. One thing appears, that in a parliament held by Henry III. *anno* 1258, there were but twelve representatives from the small barons. Yet soon thereafter struggles betwixt the king and his great barons growing hot, there were in the parliament 1264 no fewer than four knights for each county.

county. This full representation was probably occasioned by the anxiety of the barons, desiring a numerous assembly, to give weight to their proceedings. And the regulation having once taken place, would readily be kept up, without any new impulse, with the difference only of more or fewer representatives from each county.

The sending representatives, in place of the small crown-vassals, was but one step towards establishing the English house of commons in its present form. Though the king's vassals convened in parliament, were distinguished into three estates, the Spiritual Lords, the Temporal Lords or Barons, and the representatives from the royal boroughs, we must not imagine they made three distinct bodies: they were all equally the king's vassals, and composed but one body-politic, which sat and voted in one house. And this form continued in Scotland so long as our parliament subsisted, after we had representatives from shires, as well as before. In England, for many centuries, the greater barons have made one body, the representa-

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tives

tives from the shires and boroughs another, who sit in different houses, and debate and vote separately. At what period this form was established, is altogether unknown, so far as I can learn; though the thing be extremely remarkable, by the change it has made in the constitution of the English government. This only is certain, that there were two houses of parliament before the 1376: for, in a parliament held that year, Peter de la Mare is mentioned by historians as speaker of the house of commons; which is a pretty strong evidence, that the commons were at that time separated from the peers, having a president or speaker of their own; for one body cannot readily admit of two presidents.

As this division of the English parliament into two bodies, was no necessary consequence of substituting representatives in place of the numerous body of electors, I am apt to imagine, that the difficulty of accommodating all the members in one place, occasioned the separation. Parliaments were of old ambulatory. Scarce a great town
in

in England but, one time or other, has been honoured with a parliament. However ill accommodated, there were no means for a separation, while all the crown-vassals sat in their own right: for they could not think of making a separate body of a few representatives from boroughs. But after representatives were introduced in place of the small vassals of the crown, a division into two bodies was readily practicable, by placing the spiritual and temporal lords in one room, the representatives from the small crown-vassals and from the boroughs in another. This practice probably had its beginning in towns where no single room was found large enough to accommodate the whole body; and has been kept up in other towns where there was not the same necessity; possibly by the influence of the peers, upon whom it conferred an additional lustre. The silence of historians favours this conjecture. Had this division of the parliament been the result of any solemn act, whether of the parliament itself, or of the king and council, such a regulation

would not readily have escaped notice*. However this be, the splitting of the English parliament into two bodies, laid the foundation of a great change in the constitution. And this event, among many, is an instance of revolutions which spring from the most accidental or trivial circumstances; and for that reason are extremely obscure in their origin, however remarkable in their subsequent appearance.

As our James I. by his long residence in

* In accounting for the causes of dark events, we must be satisfied with conjecture where evidence is wanting; and for dividing the English parliament into two houses, no cause appeared more probable than that suggested in the text. But, since the former edition, I have discovered some authority for assigning a different cause, *viz.* “ That the commons, sitting in presence of the king, and among the nobles, disliked it, and found fault that they had not free liberty to speak. And, upon this reason, that they might speak more freely, being out of the royal sight of the king, and not among the great lords, so far their betters, the house was divided, and came to sit asunder.” *Journals of Q. Elisabeth's parliaments by Sir Simon D'Ewes, p. 515.*

England,

England, was perfectly well acquainted with the English constitution, it appears to have been his plan, to introduce into his own kingdom many of the laws and customs of that country. What we have at present to take notice of, are contained in the above-mentioned statute, act 101. parl. 1427: 1st, Exempting the small barons and freeholders from attendance in parliament, upon condition of sending representatives; 2^d, Making these representatives, perhaps with the representatives from the boroughs, a separate body, which appears from the regulation appointing a president to be chosen, called the *common speaker* of the parliament; 3^d, Enacting that the prelates and peers should be called to parliament *nominatim* by special precepts. Touching the first of these regulations, of which mention has been made above, the act did not take effect. The small vassals of the crown, who had their own more than the public interest at heart, laid hold of the exemption given them, without thinking of sending representatives, because these representatives were to be subsisted at the charge of their constituents.

And as to the prelates and great lords, in whom the power of the parliament centered after this regulation, it was evidently against their interest that representatives should be sent. The king indeed had an interest, in order to balance the exorbitant power of the nobles; but in those rude times this was overlooked, infomuch that a statute was obtained in the reign of James II. *viz.* act 75. parl. 1447, relieving all freeholders from attendance, whose yearly rent did not amount to 20 *l.* without a word of their being obliged to send representatives. Matters continued upon this footing till the days of James VI. save that by the act 78. parl. 1503, all were exempted from attendance whose rent was within one hundred merks. The Reformation greatly increased the power of the nobility, as it almost extinguished the prelates. The abbacies were totally demolished; and but few of the bishops frequented the parliament. By this means the nobility had all in their power: they oppressed the boroughs, and were too strong for the king. Thus the government became purely aristocratical, and stood in
need

need of some regulation to bring it to its former poise. Had the act of James I. been followed out, in the same manner as the like regulation was followed out in England, this evil would have been prevented: and now the only remedy was to revive that act. The surprise is, that a majority was found among the nobility, to countenance a regulation, which behoved remarkably to abridge their authority. It appears from the statute, which is the 114th, parl. 1587, that great opposition was made. The attendance of the small barons in parliament was so thoroughly in disuse, that they could not now think of resuming as a privilege, what they had so long been exempted from as a service. But it had all along been esteemed the prerogative of the crown, acknowledged in every statute relating to the parliament, that the king might call, by special writ, any of his vassals to attend the parliament, notwithstanding their exemption. Probably this was the means made use of by the king's ministers, to gain the end proposed: the nobles would be told, that if they voted against the regulation, the
king

king would use his privilege of calling to parliament a number of his small vassals, sufficient to overbalance the nobility. As this is merely a conjecture, it is submitted to the judgment of others. One thing is certain, that the act 1427 was revived, and the small barons sent representatives to parliament from that period downwards.

I have mentioned above, that it was a part of the plan of James I. to divide his parliament into two bodies, as in England. This was not followed by James VI. for our parliament continued one body to the end. It is left to conjecture, whether this was of design, or by accident; for our historians are extremely defective upon our civil transactions. We have no occasion to go farther than to England, to learn what influence it has upon the constitution, to divide a parliament into two houses; and as it was a politic age, this of James VI. I am apt to believe, it was not without design, that the parliament of this kingdom was continued upon its old footing. This is a curious subject, and deserves peculiar attention. It is

is pretty obvious, that the king's negative against a regulation agreed to by both houses, is not a very valuable privilege. The opinion of the two houses, understood to be the sense of the nation, has too great force to be resisted by the *Veto* of any single man, the king not excepted. His refusing an assent in such a case, is virtually declaring himself against the interests of his people. But an English monarch is seldom brought under this dilemma. The narrowest majority in either house, on his side, relieves him. He may appear to be neuter. Thus, taking the parliament complexly, a great majority may be against the king, bent, we may suppose, to fetter him with new limitations; and yet he may ward the blow, by gaining over a majority in either house. This cannot happen where the parliament makes but one body, as in Scotland. So far the advantage lies on the king's side, where the parliament is composed of two bodies. But to balance this, the same advantage lies on the side of the people, where the king's views are to enlarge his prerogative by authority of parliament; for

a majority in either house, interposing a *Ve-*
to, frustrates his design. In a word, a single
body gives great opportunities for making
incroachments on either side; whereas,
supposing the constitution to be sound and
entire, it is best preserved so, by a parlia-
ment composed of two bodies.

So far the scales seem to hang upon a
level. But then seldom is a nation so united,
as to think of making incroachments upon
the prerogative-royal: whereas the king, a
single person, has many opportunities, and
seldom wants inclination, to enlarge his
powers. King James and his ministers could
not but be sensible of this; and therefore a
single body was their game. But the con-
trivance lay a little deeper; and this may
be discovered, by attending to one branch
of the constitution of the parliament, pe-
culiar to Scotland. At what time the lords
of the articles were established, is uncertain.
But as the sessions of our parliament were
generally short, it was found necessary,
when business multiplied, to elect a certain
number out of each estate, to prepare and
digest

digest matters for the parliament. This select body was called the *Lords of the Articles*; and it was a rule, that no business could be introduced into parliament, but what was prepared by these lords. This was in reality a negative before debate, which is of vastly greater importance than the king's negative after; and the worst of it is, that there was no remedy, in our constitution, against the partiality of the lords of the articles, however glaring it might be. A body thus constituted, could not fail in time to ingross, in a great measure, the authority of parliament. And in fact so limited were, at length, the powers of the parliament, that it seldom had occasion to sit above two days. On the first day of meeting, an equal number out of each estate were chosen to be the lords of the articles, to whom the king joined eight of his crown-officers. These received all the grievances or articles that were brought to them, and formed them into bills, or rejected them, at their pleasure. When all matters were ready, the parliament sat another day, and it was their only business to approve

approve or reject the bills that were laid before them.

Such was the practice in the year 1587, when the act of James I. was revived. The king had a fair chance to secure the lords of the articles for him, whether by influencing their election, or by gaining them after they were elected. At any rate, eight officers of state devoted to the king, must have had great influence in so small a body. By this means the king was pretty secure, that nothing would be brought into parliament without his approbation. But this influence was not reckoned sufficient. About this very time, or soon after, a scheme was laid, and executed, to improve upon the foregoing regulation. Under pretext that the lords of the articles had not sufficient time to overtake the multiplicity of affairs laid before them, four persons were to be named out of each estate, whose province it was to meet twenty days before the parliament, to receive all supplications, &c. to reject what they thought frivolous or improper, and to digest into a book what they chose to

to lay before the lords of the articles. This was done by the act 218. parl. 1594. The act may be thought defective, as no provision is made in it for the choice of this select body. But this was purely an artifice. It would have been too barefaced to have named the king openly ; for it was the same with giving him a negative before debate : and yet obviously the choice behoved to rest upon the king ; for a body that was to meet before the sitting of the parliament, could not possibly be chosen by the parliament. But this was not all. To secure to the king absolutely the power of bringing matters into parliament, it is further declared, “ to be the privilege of the king, to bring “ directly into parliament, all matters con- “ cerning himself, or common good of the “ realm.”

This statute was too manifest an incroachment upon the liberty of the subject, to be patiently submitted to. It has for that reason been dropt ; for I cannot otherwise conceive, what need there was for the artifice made use of by the ministers of Charles I.

in the parliament 1633, to secure the lords of the articles for the crown; to wit, that the bishops should chuse eight peers, and the peers eight bishops; and that these sixteen should jointly chuse eight barons, and eight commissioners for boroughs. With these were joined the officers of state; and thus were the lords of the articles constituted, the chancellor to be president in all their meetings. The artifice here is obvious. The bishops were universally devoted to the crown, as they have been at all times, and upon all occasions. The eight peers elected by them were sure cards for the crown, supposing but eight of so numerous a body capable of such a bias. As the whole bishops were for the crown, it was indifferent which eight were chosen; and we may be certain, that none would be chosen out of the commons, but what were for the king's purpose, when such were the electors. This method, we may believe, was not practised by the parliaments during the troubles. They shewed their dislike to such artifices, by abrogating the above-mentioned statute 1594. It was judged too bold a step to re-
vive

vive this statute after the restoration. But as the parliaments, both of England and Scotland, which were called upon the restoration, were abundantly obsequious to the king's measures, another scheme was ventured upon, very little more disguised, which was, to enact into a law the regulation contrived in the 1633, to secure the lords of the articles for the crown. This was done by the first act, parl. 1663. And thus, by the constitution of the Scotch parliament, nothing in effect could be brought under deliberation but by the king's special authority, which was an absolute bar to all statutes for securing the liberty of the subject. On the other hand, he had a much better prospect of obtaining laws for his own benefit, than he had in England. A majority did his affair, which did not always answer in the other kingdom. For supposing, upon the whole, a majority for the king; yet if there were the narrowest majority in either house against him, nothing could be carried on.

For my part, I should have thought it

less criminal in our restoration-parliament, to have openly bestowed upon the king, a negative before debate, than, in such an underhand artificial manner, to betray their constituents and nation. This will stand as a monument of the wicked enterprises of ministers, and of the venality of our parliaments; and long may it stand, if it serve as a warning to guard us against such opprobrious devices, if such shall ever again be attempted.

With relation to the third article of the regulations introduced by the statute 1427, that the prelates and peers should be called to parliament by special precepts, we must recapitulate, in a few words, what has been said above upon the English form of calling a parliament. Parliaments originally were called by issuing briefes out of the chancery to the several sheriffs, directing them to summon in general, or edictally, all those who were obliged to attend in parliament. A public notification, probably at the market-cross of the shire, was thought sufficient. Besides this general summons, which comprehended

comprehended all the ranks equally, a form was introduced, in the reign of King John, of writing letters to the prelates and great lords by name, acquainting them of the time and place of holding the parliament, and requiring their attendance. When representatives were introduced in place of the small barons, the general summons was laid aside as useless. The great barons were called by special letters, and the briefes directed to the sheriffs, came now to be more special, ordering them to return two knights of the shire, and two burgeses out of each borough within the shire; which form is continued down to this day. In Scotland, where the small barons laid hold of their exemption, without sending representatives to parliament, the general or edictal citation continued in use as formerly, with this addition only, that, besides the general citation, letters came to be directed to every one of the great lords in particular. There was not the same necessity here to alter the form of citation, that there was in England: The general summons answered the purpose now as well as formerly; for, not compre-

hending any but who were bound to give attendance, it readily accommodated itself to the new regulations, exempting from attendance those whose yearly rent was under a certain sum. That the general and special summons were used at the same time, is clear from an order of James III. for dissolving the parliament and calling a new one, entered in the records of parliament, 21st February 1487. The words are, “ We
“ do you to wit, that our sovereign Lord,
“ by the advice of his council, has, for
“ certain reasonable and great causes, de-
“ ferted and dissolved his parliament, that
“ was continued of before to the 5th of
“ May next to come, and has ordained a
“ new general parliament to be set, and
“ proclaimed to be holden at Edinburgh
“ the 12th day of May next to come, with
“ continuation of days, and general pre-
“ cepts to pass to all lords, prelates, ba-
“ rons, freeholders and commissaries, and
“ with special letters under his signet, to all
“ the prelates and great lords of his realm,
“ to shew and declare to them the cause of
“ the sitting of his said parliament.”

I have annexed a copy of the brieve issued out of the chancery for an edictal citation; but I have not been so lucky as to find anywhere the form of the special precept under the signet. This precept probably has wore out of use, and the calling of the parliament been left to the edictal citation, comprehending all persons who were bound to give attendance. What confirms me in this opinion is the statute 1587, so often above mentioned, directing commissioners to be chosen for each sherriffdom, and their names to be notified to the director of the chancery. The form of calling these commissioners to parliament is expressed in the statute: “ That the said commissioners
 “ be warned at the first, by virtue of pre-
 “ cepts forth of the chancellary; or by his
 “ Highness’s missive letters; and in all time
 “ thereafter by precepts of the chancellary,
 “ as shall be directed to the other estates.”
 At this period it would appear there was no other precept in use but that issued out of the chancery, *viz.* the brieve directed to the severall sherriffs, ordering a general or edictal summons. And this brieve also was
afterwards

afterwards laid aside, and in place of it parliaments were convened by the king's proclamations.

The form of calling a British parliament, so far as concerns Scotland, is appointed by particular statutes. In order to the electing of the sixteen peers, a proclamation is issued under the great seal of Great Britain, commanding all the peers of Scotland to assemble, at such time and place as is appointed in the proclamation, then and there to elect the sixteen peers: and the proclamation must be duly published, at the market-cross of Edinburgh, and in all the county-towns of Scotland, twenty-five days before the meeting for election; 6th Anne 22. The like proclamation might have sufficed for the meeting of the freeholders in every county, to chuse their representatives; but a different form was chosen; and reasonably, being more analogous to the practice of England. Brieves or writs under the great seal of Great Britain, are directed to the several sheriffs and stewards; who, on receipt thereof, must forthwith intimate the time of election

tion of the commissioners for shires; and, at the day appointed, the freeholders must convene at the head-borough of their shire or stewartry, and proceed to the election of their commissioner. And the clerk of the meeting must immediately return the name of the person elected, to the sheriff or steward; who shall annex it to his writ, and return it with the same into the court out of which the writ issued. By authority of the same brieve or writ, the sheriff or steward must forthwith direct a precept to every royal borough within his jurisdiction, commanding them forthwith to elect a commissioner, as they used formerly to elect commissioners to the parliament of Scotland, and appointing the commissioners to meet at the presiding borough of the district, upon the 30th day after the day of the teste of the writ, there to chuse their burghers for the parliament. And the common clerk of the presiding borough must, immediately after the election, return the name of the person elected, to the sheriff or steward; who shall annex it to his writ, and return it with the same, as aforesaid; 6th Anne 5.

By

By an edictal or general summons one benefit arises to the subject, which was not attended to when the statute 1587 was made, otherwise it is probable this form of summons would have been laid aside, and that of personal citation taken up; for which there was the better colour, that it was following out the plan laid down by James I. Upon an edictal citation, every baron who has a seat is intitled to appear in parliament, because he is called: but by a personal citation, opportunity is given to drop out of the list, any particular baron the king is not pleased with. Attendance in parliament is a personal service, which cannot be performed by the vassal, unless the superior chuse to accept of it; and for this reason it is not due, unless demanded. A baron, therefore, who is not called, cannot regularly take his seat in parliament. This matter is well understood in England, where many times the advantage has been laid hold of, which a personal citation gives the king. One remarkable instance there is in a parliament convened by King Henry III. *anno* 1255, when a great many lords were omitted

omitted to be summoned, who were not in the king's interest. This is a defect in our constitution, to which I know of no remedy, other than the danger there would be in taking advantage of it. A step so evidently subversive of the constitution, would alarm the whole nation.

The Preamble to the Statutes of Robert III.

Parliamentum Domini nostri Roberti Tertii Scotorum Regis illustrissimi, tentum apud Sconam, die Lunæ, vicesimo primo Februarii; anno gratiæ millesimo quadringentesimo, regni sui undecimo, cum continuatione dierum subsequen-
tium: summonitis et ibidem vocatis, more solito, episcopis, prioribus, ducibus, comitibus, baronibus, libere-tenentibus, et burgenfibus, qui de Domino nostro Rege tenent in capite.

Form

*Form of the Writs for calling a Parliament
in Scotland.*

The parliaments of Scotland were of old called and convened by brieves directed forth of the chancery ; for issuing of which brieves, there was an act or ordinance made by his Majesty, with advice of his privy council, for the director's warrant, in the following terms.

THE King's Majesty, with advice of his council, has ordained an parliament to be proclaimed, to begin in the burgh of Edinburgh, the day of for ordering, treating and concluding of such great matters as instantly occur concerning the King's Grace, the weal of this realm, and the lieges thereof : therefore ordains the director of the chancery, to direct precepts to all prelates, barons, commissars, and bealxies of boroughs, and all others, our sovereign Lord's freeholders within this realm, charging them to compare, the said day and place, for their advice

vice to be had in such things as at that time shall be proponed to them.

In pursuance of this ordinance, the director gives out precepts, or brieves; whereof I shall insert one, directed to a bailie, all the rest being of the same tenor, and differing in nothing but in the designation of the party to whom it is directed.

JACOBUS, Dei gratia, Rex Scotorum, Balivo suo de Cowall, et deputatis suis, salutem. Quia ex avisamento et deliberatione nostri charissimi consanguinei ac gubernatoris, ac dominorum nostri concilii, ordinavimus parliamentum nostrum tenendum apud Edinburgum, et inchoandum tali die cum continuatione dierum; vobis præcipimus et mandamus, quatenus summoneatis, seu publice summoneri faciatis, omnes et singulos episcopos, abbates, priores, comites, barones, et cæteros libere-tenentes, totius baliaë vestraë, et de quolibet burgo tres vel quatuor de sufficientioribus burgensibus sufficientem commissionem habentibus, quod compareant coram nobis, dictis die et loco,

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in dicto nostro parlamento, una cum aliis regni nostri prelatis, proceribus, et burgorum commissariis, qui tunc ibidem propter hoc intererunt congregati, ad tractandum, concordandum, fubeundum, et determinandum ea, quæ in dicto nostro parlamento, pro utilitate regni nostri et reipublicæ tractanda fuerint, concordanda, fubeunda, et determinanda; et vos sitis ibidem dicto die, habentes vobiscum summonitionis vestræ testimonium, et hoc breve. Et hoc, sub pœna quæ competit in hac parte, nullatenus omittatis. Datum sub testimonio magni nostri sigilli, apud Edinburgum, penultimo die mensis Maii, anno regni nostri secundo.

BALIVO DE COWALL
PRO PARLIAMENTO.

This precept was under the testimony of the great seal in white wax.

Form

*Form of the Brieve or Writ for calling a
Parliament in Great Britain.*

GEORGIUS Dei gratia, Magnæ Britanniæ, Franciæ et Hiberniæ Rex, Fidei Defensor, Vicecomiti comitatus de Bute, salutem. Quia de avifamento et assensu concilii nostri, pro quibusdam arduis et urgentibus negotiis, nos, statum et defensionem regni nostri Magnæ Britanniae et ecclesiae concernentibus, quoddam parliamentum nostrum, apud civitatem nostram Westminster, decimo die Maii proximo futuri, teneri ordinavimus; et ibidem, cum praelatis, magnatibus et proceribus dicti regni nostri colloquium habere et tractatum: tibi praecipimus, firmiter injungendo, quod, immediate post debitam notitiam prius inde dandam, unum militem gladio cinctum, magis idoneum et discretum comitatus praedicti per liberè-tenentes ejusdem comitatus, qui electioni hujusmodi intererunt, secundum formam statuti in eodem casu editi et provisi, eligi facias. Tibi etiam praecipimus, quod de quolibet regali burgo comitatus praedicti.

unum commissarium ad eligendum unum burgensem pro classe sive districtu, de discretioribus et magis sufficientibus, libere et indifferenter, juxta formam statuti inde editi et provisi, eligi facias. Et nomina eorundem militis et burgenfis, qui tibi forent retornata per clericos ad inde appunctuatos, in quibusdam indenturis inter te et illos respective conficiendis, licet hujusmodi eligentes præsentes fuerint vel absentes, inferi, eosque ad dictos diem et locum venire facias. Ita quod idem miles et burgenfis plenam et sufficientem potestatem habeant ad faciendum et consentiendum his quæ tunc ibidem de communi consilio dicti regni nostri (favente Deo) contigerint ordinari super negotiis antedictis; ita quod per defectum potestatis hujusmodi, seu propter improvidam electionem militis et burgenfis prædictorum, dicta negotia infecta non remaneant quovis modo; nolumus autem quod tu, nec aliquis alius Vicecomes dicti regni nostri aliquammodo, sit electus. Et electiones illas quæ tibi forent certificatae et retornatae ut præfertur, nobis in cancellariam nostram ad dictos diem et locum certifies, juxta formam statuti,

una

una cum hoc breve. Teste meipso, apud
Westminster, 14to die Martii, anno regni
nostri octavo.

JEKYLL BALSTRODE.

Written on the tagg thus:

Vicecomiti comitatus de Bute, pro eligendo
ad parliamentum decimo die Maii proxime
tenendum.

JEKYLL BALSTRODE.

E S S A Y III.

HONOUR. DIGNITY.

NO appetite in human nature is more universal, than that for honour or respect; which, considered as a tribute paid to intrinsic merit, is highly agreeable. But though all men are fond of respect, the bulk of men, unable or unwilling to purchase it at such a price as real merit, endeavour to secure it to themselves at a cheaper rate. Early attempts were made to annex it to lands and offices, and the law has been called in aid to support the artificial connection. Thus, what ought to be a free-will offering, is changed to a matter of right. We lay claim to honour, as if it were our property, and as if, like land or goods, we were intitled to it by law. And the world has improved so much upon this indolent system, that the different degrees of respect and honour are by custom nicely adjusted, both in language and behaviour;
“ Qualities

“ Qualities and virtues being assigned to
 “ persons of rank, under the titles of
 “ *Graces, Excellencies, Honours*, and the
 “ rest of this mock praise and mimical ap-
 “ pellation,” as is happily expressed by an
 eminent author.

In a moral view, nothing is more pernicious than this artificial connection, as it robs worth and merit of their proper reward, to annex it to the goods of fortune, which, independent of it, have but too great influence. But considering the matter politically, the establishing artificial marks of worth, which every one can discern, may be justified. Government could scarcely subsist without them. Real merit is so remote from vulgar apprehension, that were rulers to be chosen by that standard, differences and dissensions would be endless.

However this be, here arises a distinction betwixt respect bestowed from the opinion of merit, which may be called *natural honour*, and respect bestowed upon the
 possessors

possessors of power and riches, which may be called *artificial honour*.

Though, among the ancients, this artificial honour was not carried so far as at present, we have however in old Rome one remarkable instance of it. To those only who had borne a curule office, it was permitted to exhibit themselves to posterity by a statue or portrait. These accordingly, as denoting the number of curule offices that had been in a family, were authentic marks of honour or dignity. Hence a division of the people into *Nobiles*, *Novi*, and *Ignobiles*. He who had the statues or portraits of his ancestors, was termed *Nobilis*; he who had only his own, *Novus*; he who had neither, *Ignobilis*: *Jus imaginis* therefore, among the old Romans, resembled the right of bearing a coat of arms among us.

But this artificial honour grew to a greater height in course of time. Besides its connection with the higher offices in the state, as among the Romans, it came to be annexed

ed to large territories, and at last rested upon families, without regard to land or office. This was the progress in all the Gothic constitutions; and this progress I shall endeavour to trace, as it tends to explain our present notions of dignity and honour.

In these Gothic constitutions, honour and dignity were originally annexed to land or office; and in no case to persons or families, independent of land or office.

Earl or Count was the name given to the governor of a province. The office being of great power and authority, could not fail to have a considerable share of dignity annexed to it. Basnage, in his *Customs of Normandy*, observes, that counts were the ordinary judges of provinces; that under Charles the Simple, they began to be hereditary; and that some few of them usurped the sovereignty. In the same way an earl in England was the judge or governor of a shire, and his office as well as dignity was for life only. William the Conqueror first
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made the office feudal and hereditary, allotting for the fees of the office, the third penny of all the pleas determined in the sheriff's court. This accession of wealth and dignity had the ordinary effect. Earls became too great to submit to the fatigue of business. Deputies were appointed in every county, upon whom was devolved all the drudgery work of the magistrate and judge. And thus it commonly happens, that the person who reaps the profit, does nothing; while the person who performs the work, is slenderly rewarded. After introduction of these *Deputes, Vicecomites, or Sheriffs*, an earldom was no long considered as a territorial office, but as a territorial dignity, which making a great figure, was a desirable object. As it no longer had any relation to a real county or sheriffdom, fictitious or imaginary counties were erected, in order to bestow the title of *Earl* upon the possessors. And these titles, by the bounty of princes, came to be multiplied exceedingly; it being observed of ribands, titles, and such like marks of distinction, which take nothing from the donor, that of all favours,

favours, they are bestowed with the best grace. Rare invention, this, to reconcile, in so happy a manner, the interests of the giver and receiver.

It is observed above, that in the Gothic constitutions, honour and dignity were annexed to land as well as to office. In England a great estate held of the king, with power of jurisdiction, &c. and a *Reddendo* of so many knights to serve the king in his wars, commonly styled a *Barony*, had dignity or honour annexed to it; and from this artificial connection, it also got the name of an *Honour*; the honour of Richmond, for example, of Woodstock, &c. And the family here was so little regarded, that whoever purchased such an estate, with the king's consent, to be held of the crown, was, of course, considered as a baron, or person of honour.

Originally lands erected into an earldom or barony, were conceived to be so intimately united, as to become one subject, not capable of division or separation into parts,

parts. And hence, in the old law of England, it was a rule, that a barony could not be split into parts, but that the whole behoved to be aliened together.

But this being a strained conception, beyond nature, especially where parts of an earldom or barony are locally separated one from another, nature prevailed over art, and the disposing of parts of a barony crept into practice.

For some time after this sort of commerce was introduced, it had little influence on territorial honour. The earldom or barony still remained in a great measure entire, with the dignity annexed to it. But when, by the arts of peace, and increase of industry, land became more universally the subject of commerce, readily passing from hand to hand, territorial honour behoved to be in an uncertain state. Let us figure an earldom or barony possessed for ages by the same family: the family falling into decay, the estate is dismembered piecemeal, till little or nothing is left. What
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is become, in the mean time, of the dignity or honour annexed originally to the estate? For the estate being split into small parts, and possessed perhaps by mean persons, the honour cannot follow any of the parts. Is the idea then lost and gone? If it still subsist, where is the object? The answer is, That it is transferred from the estate to the family. And the transition is easy and natural: For though possession of the earldom or barony was the cause of the respect paid to the family, yet the family being the immediate object, is respected by the vulgar without consideration of the legal title, and consequently is respected even after the title is gone. Thus, in Germany, territorial titles of honour are communicated to every branch of the family, though possessed of no land-property; and therefore it is not wonderful, that, in Britain, the title should remain with the chief branch of the family after the estate is gone.

One thing did facilitate the transferring of honour from land to families. It was

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Malcolm Canmore, who, in imitation of William the Conqueror, introduced the territorial dignities of Earl and Baron, which produced surnames, not formerly in use: *Malcolmus Tertius, sublato Maccabæo tyranno, regnum legitime sibi debitum occupavit; quod ut ornaret, unicâ curâ incubuit: tunc et a prædiis nobilibus nomina quisque sumpsit, et cum magna frequensque nobilitas S. Margaretam ex Hungaria & Anglia secuta, in Scotia consedisset, splendorem novo suo principatui additurus, Barones et Comites creavit; Dempster, p. 120.* The use of surnames had undoubtedly the effect to make a more intimate union among the several parts of the compound idea of a family, by binding all these parts together under one common name; which tended to facilitate the connection betwixt a family and a title of honour, and made it as easy for the mind to rest upon a family for the object of honour, as upon an estate.

It will be obvious, that this change in the nature of honour, from territorial to personal, behoved to be gradual. Notwithstanding

standing frequent instances of the title remaining with a family after the estate was dismembered, the case would be different, where the earldom or barony was disposed of whole and entire; for there the honour, for many ages, was certainly transferred with the estate. Opposite instances behoved to breed a confusion and darkness in the idea of honour, being sometimes applied to land, sometimes to families independent of land. The matter is settled by course of time. The notion of territorial honour is quite worn out, and at present we have no example of honour, but what is personal, and annexed to families independent of land. I have heard of no exception in this island, unless it be with relation to the castle of Arundel, which at the same time appears to be a doubtful instance.

Though territorial honours be now at an end, there remains one remarkable consequence of them, which is in full force. It is a maxim in law, That the king is the fountain of honour, and that it is the prerogative of the crown, to bestow honours and dig-

nities of all kinds. It is not difficult to come at the foundation of this prerogative. Though it be the privilege of every superior, to unite discontiguous lands into one artificial subject, in favour of his vassal; the king is the only superior who can unite lands into an earldom or barony; for a plain reason, That it is not called an earldom or barony, unless it be held of the king. The honour which followed this erection or creation flowed from the king, consequentially at least; and as the king's consent in the quality of superior, is requisite for transmitting an earldom or barony to a purchaser, hence the king came to be considered as the fountain of territorial honour, in the same manner as he is the fountain of official honour, by his power of appointing the officers of the crown. Taking the matter strictly, it was not the king who bestowed the honour, but the people. Nothing flowed from the crown, but the office, or the barony, which carrying great power and pre-eminence, was naturally attended with honour and respect. And supposing honour to be a legal accessory of a barony, or office, it will not follow, that the
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the king can create honour, independent of a barony or office, which would be creating an accessory without a principal. But our forefathers were by no means accurate in their conceptions: from the king's power of bestowing the means of acquiring honour, to infer a power of bestowing honour independent of these means, is no better reasoning, than to infer a man's power of bestowing knowledge without any means, from his power of bestowing riches, which are one good means to acquire knowledge. Yet upon this, and no better foundation, is the king's prerogative built, of bestowing personal or family honours, when these, by degrees, came to be substituted in place of the other.

And thus a new distinction was, by degrees, introduced, betwixt honour annexed to land, or office, and honour annexed to persons, whether a single person or a family. And this latter sort of artificial honour, I shall take the liberty hereafter to call *personal honour*, though very different from that respect and deference which is voluntarily

tarily paid to certain persons, from the opinion of real worth.

There are preserved in England many old charters of the creation of earls, which uniformly run in the style of a grant of an office. When by the multiplication of earls beyond the number of sherriffdoms, an earldom sunk down to a territorial dignity, these charters were varied, and accommodated to the erection of lands into an earldom, in favour of the grantee and his heirs, which of course bestowed upon him the territorial dignity. Afterwards, when the notion of personal honour crept in, certain solemnities were superadded to the erection of the lands into an earldom, such as girding the proprietor with a sword, covering his head with a cap of honour and circle of gold, all of them marks of personal respect. And now, both in England and Scotland, the notion of territorial honour having vanished, an earl's patent is so framed, as to import personal dignity merely, without relation either to office or to land.

With regard to Scotland, the oldest creation

tion of an earl I have seen, is of Ranulph
 Earl of Murray. King Robert I. grants
 certain lands to him, and to the heirs-male of
 his body, to be held of the crown *in libero*
comitatu. As no other form or ceremony
 was used in creating this gentleman an earl,
 the charter is full evidence, that in those
 days the title of an earl was considered as
 merely a territorial dignity. A copy of
 the charter is annexed for the satisfaction
 of the curious. Another charter I have read
 of, by King David II. “ in favour of Sir
 “ Malcolm Fleming, Knight, and of the
 “ heirs-male of his body, for his homage
 “ and worthy services, of the lands of
 “ Farynes, Deall, Rynos, and the burgh
 “ of Wigtoun, with their whole per-
 “ tinent, and all the king’s lands of the
 “ whole sherriffdom of Wigtoun, with the
 “ advocation of the churches, and right of
 “ patronage of the monasteries and abbacies
 “ existing within the sherriffdom; reserving
 “ to his Majesty the right of patronage of
 “ the episcopal see of Whytehorn or Gal-
 “ loway. And also because the said place
 “ of Wigtoun was looked upon as the
 “ principal

“ principal manor of the whole sheriffdom
 “ of Wigtoun, the king ordained, That
 “ the said Malcolm and his heirs should
 “ for ever take the name of *Earl*, and be
 “ called the *Earls of Wigtoun*. Further,
 “ the said lands are erected into a free re-
 “ gality, with power to judge upon the
 “ four articles of the crown. The said
 “ earl and his heirs giving the service of
 “ five knights or soldiers to the king’s ar-
 “ my. Dated at Airth, 9th November,
 “ 1343.” This creation of the Earl of
 Wigtoun I have chose the rather to men-
 tion, because of one notable circumstance,
 which demonstrates the notion entertained
 in those days of this dignity, that it was
 merely territorial, and went along with the
 lands to the purchaser, in the same manner
 that the dignity of a baron by tenure did.
 Upon the 16th July, 1371, a charter is
 granted by Thomas Fleming Earl of Wig-
 toun, to Archibald of Douglas, knight of
 Galloway, “ whereby, for the feuds be-
 “ twixt him and the great men and inha-
 “ bitants of the earldom of Wigtoun, and
 “ for 500 l. Sterling paid him, he disposes
 “ to

“ to the said Archibald the foresaid earl-
 “ dom, with the pertinents.” This charter
 was confirmed by Robert King of Scotland,
 8th February, 1371. After this aliena-
 tion of the earldom, Thomas Fleming was
 no longer considered as an earl; of which,
 among other writs, the following charter is
 full evidence, granted by Robert II. in
 which “ he confirms a charter granted by
 “ the said Robert Fleming, designed *Laird*
 “ of *Fulwood*, to William Boyd, of a wad-
 “ set of all the said Thomas Fleming’s
 “ lands within the barony of *Lenzie*, for
 “ 80 l. Sterling.” The principal charter is
 dated at *Cumbernauld*, 1372, and the char-
 ter of confirmation, at *Kinghorn*, 20th June,
 1375. Further, that the said Archibald
Douglas knight of *Galloway*, did, after the
 purchase of the earldom, take upon him
 the title of *Earl of Wigtoun*, appears by a
 charter of confirmation, still extant, granted
 by him to *Christian Ramsay*, of the lands
 of *Balencreif* and *Gosford*, dated 6th
 March 1422, which runs thus: *Omnibus*
banc chartam visuris vel audituris, Archi-
baldus de Douglas, Comes de Wigtoun, ac
primogenitus

primogenitus filius et heres magnifici et potentis Domini, Domini progenitoris nostri, Domini Archibaldi Comitis de Douglas, Domini Galwidie et vallis Annandie, salutem, &c.

In Scotland, as well as in England, we can trace the dignity of an earl through its different changes. It was at first, as above laid down, merely territorial, annexed to the property of the earldom, and transferred with it to every purchaser. Thereafter, to perpetuate the dignity in a family, and to prevent the ignominy of its being saleable, it came into practice, not only to erect the lands into an earldom, as formerly, but also to create the proprietor an earl; in order that he, and his heirs named in the grant, should for ever enjoy that title and dignity. And at last the dignity became entirely personal, being given by patent to the patentee, and his heirs named, without relation to land. As these changes were influenced by opinion, without any established regulation, we must expect much fluctuation of practice among the different forms,
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in their progress from the one extreme to the other. In particular, territorial earldoms subsisted long after the mixed form was introduced, and probably even after the introduction of patents, making the dignity purely personal. I say, probably; because, as we know historically, that many patents have been granted which are not upon record, we must in some measure be uncertain about the æra of the first patents. With respect to the territorial dignity, we have examples of it so late as the 1581. There are two charters upon record, copies of which are annexed. The first, dated *anno* 1481, contains a grant of the earldom of Athol to John Stewart, Knight, by virtue of which grant, he is the same year inserted in the parliament-roll as Earl of Athol. The other, dated 22d April 1581, contains a grant of the earldom of Arran to Captain James Stewart; and, in virtue of that grant, he, as Earl of Arran, is named one of the commissioners for holding the parliament, 26th of October 1581. Of the mixed form we have one clear instance, as far back as the 1488, in a charter granted that year to Patrick

Patrick Lord Hails, erecting his lands of Bothvile into an earldom; and at the same time creating him an earl, by the form of belting, in order that he, and his heirs for ever, should be called *Earls of Bothvile*, and enjoy the dignity of an earl. A copy of this charter is also annexed.

From a charter upon record, granted by Charles I. to the Earl of Glencairn, it might be thought that patents were introduced into Scotland as early as the reign of James III.; for that charter ratifies letters-patent *anno* 1488, creating the Earl's ancestor an earl. But upon reflection it will be found, that this charter affords no evidence of the antiquity of what is properly termed *a patent of honour*; because charters are *literæ patentes*, as opposed to *literæ clausæ*, no less than patents are. And the following facts make it probable, that the letters-patent referred to in this charter, were no other than a charter erecting the estate of Glencairn into an earldom.

The Earls of Eglintoun and Cassilis having,

ving, *anno* 1606, obtained a decree of the
 secret council, preferring them in the order
 of parliament before the Earl of Glencairn,
 the latter, *anno* 1610, obtained a decree of
 the court of session, reducing and annull-
 ing the said preference, for the following
 reason: “ That the pursuer’s predecessor
 “ was created Earl of Glencairn by James
 “ III. in the month of May 1488, before
 “ which time the defendants cannot show
 “ that the dignity of an earldom was grant-
 “ ed to either of them.” And to verify
 this reason, a charter and infestment was
 produced, granted by James III. to the
 Earl’s predecessor, bearing date as aforesaid,
 in the month of May 1488. This charter
 is not found on record; but as it was never
 the practice to give infestment upon a patent
 of honour, it is highly probable, that this
 infestment was in the usual form, of erect-
 ing the estate of Glencairn into an earl-
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The first instance we can discover of an
 earl created by a patent, is that of Gilbert
 Lord Kennedy, created Earl of Cassilis. For

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though the patent be lost, yet that he must have been created by patent, appears as follows. In the records of the lords of council, David Lord Kennedy, 7th of August 1509, appears as procurator for the Laird of Bargeny, to answer to the tenants of Cumnock, and to their summons made upon the said Laird. And upon the 17th of November, the same year, mention is made of an action pursued by David Lord Kennedy, now Earl of Cassilis, against John Shaw, &c. And that he was not created an earl by erecting his lands into an earldom, appears clearly from the following charters of the family, down to the year 1642, in which the lands of Cassilis are always denominated a barony, and never an earldom. In the said year 1642, and no sooner, was the barony of Cassilis erected into an earldom.

We now proceed to a more particular examination of the dignity of Lord Baron. In England, three sorts of barons are taken notice of by writers; barons by *tenure*, barons by *writ*, and barons by *creation*. Barons by tenure are they who derive their
dignity

dignity and privileges from their lands, the same who are described above, under the name of *territorial barons*. Barons by writ came to have a being after the small barons and freeholders were exempted from attendance in parliament. The exemption was granted in England, as well as in Scotland, with a reserved power to the king, to require the attendance of any of them in parliament, when he should see cause. This was done by a special writ, directed by the king to the baron or freeholder, whose presence was required, and who was not otherwise bound to attend the parliament. But as this writ, whether we consider the nature or tenor of it, was fulfilled by the person's attendance in that particular parliament to which he was called, leaving him to enjoy his privilege of exemption from other parliaments, when the summons was not renewed, it doth not readily occur why this writ should bestow any degree of nobility, whether personal or feudal. And supposing it did, the person thus summoned to parliament was still a baron by tenure; because none could be subjected to this

summons, but those who held of the king *in capite*. This distinction therefore is little to be regarded; and accordingly we have no traces of it in our Scotch antiquities.

Barons by patent are those who are created by the king, *Barons and Lords of Parliament*. It is agreed among authors, that the first instance of this kind upon record is in the days of Richard II. who, in the year 1387, created John Beauchamp of Holt, Baron of Kiderminster, and Lord of parliament. The patent is in the following words: *Rex, &c. salutem. Sciatis, quod, pro bono servitio quod dilectus et fidelis Miles noster Joannes de Beauchamp de Holte, Senescallus Hospitii nostri, nobis impendit, ipsum Joannem in unum Parium et Baronum regni nostri Angliæ præfecimus, volentes quod idem Joannes, et hæredes masculi de corpore suo exeuntes, statum Baronis obtineant, ac Domini de Beauchamp et Barones de Kiderminster nuncupentur. In cujus, &c. dat. 10. Octob. &c.*

I have given this patent at large, that the nature of the grant may be the better understood ; and it merits attention, because, by creating earls without relation to a county, and barons without relation to a barony, foundation was laid for a great change in the constitution of parliament, though the consequence probably was not early foreseen. The parliament was originally composed of the king's vassals, and the king had no power to bring any person into parliament, who did not hold of him in chief. By the multiplication of earls beyond the number of counties, which was begun upon the fiction of erecting a castle, or a manor, into a county, and afterwards carried on without that form, the title of *Earl* came to be considered as a personal dignity ; and now here was another personal dignity invented, by creating a man *a baron and lord of Parliament* ; which, though it was probably at first bestowed upon barons by tenure, came afterwards to be bestowed upon all persons indifferently, without regard to land. An earl originally was intitled to sit in parliament, as the king's im-

mediate vassal, and a baron upon the same footing: but now, as the king, by gradually deviating from the original constitution, has acquired, by long use, the privilege of making an earl without a county, and a lord of parliament without a barony, it may happen some time hereafter, that the house of peers shall be filled with men who have little or no property in land. It must be acknowledged, that seldom has the peerage been bestowed but upon men of opulent fortunes: but as the crown is under no restraint in this particular, we owe it more to the goodness of our sovereigns, than of our constitution, that the house of lords is composed of members, who, if they be not entirely independent, have themselves more to blame than their circumstances.

Though the foregoing diploma is the oldest that is upon record, it follows not, that it is the first of the kind. The style of the diploma rather argues an established practice, as it is not introduced with any preamble, importing a new dignity. At what time then, by whom, and upon what occasion,

occasion, this new class of peerage was invented, is uncertain. It may appear hard to be conceived at first view, what could be the intention of it. In the reign of Richard II. and for a long time before, none but the greater barons attended the parliament, the small barons and freeholders appearing by their representatives. Now, to what purpose could it be, to create a great baron, lord of parliament, who was intitled already to that privilege? And if the honour was designed for a small baron or freeholder, it was sufficient to call him to parliament, by a special writ. But when the matter is more attentively considered, there will be found probable reasons for introducing this dignity. The commerce of land, begun some centuries before, was greatly increased in the 1387. A barony by tenure, which was originally a permanent dignity in a family, was no longer considered as such, after frequent instances of the transmission of these dignities from hand to hand, in the way of commerce. The dignity, which was considerable while it was confined to certain families, fell in its value, after it

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came to be exposed to sale, with the barony to which it was annexed. This made persons aim at some external mark of honour, which should be permanent in their families, as baronies had been of old. And this was effectuated, by creating them, and their heirs, barons, and lords of parliament: for here the dignity and privilege being bestowed upon a family, and not upon land as formerly, was inherent in the family, and behoved to subsist so long as the family subsisted. Nor did this invention require any great stretch of fancy: for, at this period, and before, the notion of personal honour had gained ground, by the frequent examples of earls created with a very slight relation to property.

In Scotland, where there has been all along a close imitation of English customs, the dignity of lord of parliament was early introduced: at what precise period, we know not; we are only certain, that this dignity was possessed by many families, before the reign of our James I. The act so often mentioned, exempting the small barons and freeholders

freeholders from attendance in parliament, is sufficient evidence; since it contains a regulation, “ That bishops, abbots, priors, “ dukes, earls, LORDS OF PARLIAMENT, “ and baronets, be summoned to parliament “ by special precept.” Whether patents were originally used in the creation of our lords of parliament, is not certain. I incline to think they were not used, because I have seen no such patent before the days of James VI. Probably there was no other form used but what is contained in the records of parliament, bearing, that the king, in full parliament, created such a man, and certain heirs mentioned, lords of parliament, and ordained him to be styled *Lord A. B. of C. D.*; the ordinary form being to annex *Lord* to the surname, with the addition of the name of the estate, connected by the particle *of*; for example, Lord Lindsay of Byres, Lord Stewart of Ochiltree. I must further observe, that if lords of parliament were created among us without a patent, the ceremony must have been performed in parliament.

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The barons by creation, called *Lords of Parliament*, were distinguished in common language from the barons by tenure, by being called *Lords*, such as, Lord Erskine, Lord Borthwick, Lord Seaton, &c.; whereas barons by tenure were called *Lairds*; for example the Laird of Dundas, the Laird of Calder, the Laird of Luss, &c. Because there is no Latin word for a laird, the barons by tenure were called *Domini*, as well as the lords of parliament were: but then, to express the difference, the following forms were constantly observed. If a laird, or baron by tenure, was meant to be expressed, it was in this manner, *Dominus de Calder*, *Dominus de Balwirie*, *Dominus de Luss*, &c. : but lords of parliament were expressed by leaving out the article, thus, *Dominus Erskine*, *Dominus Seaton*, *Dominus Borthwick*. For illustration's sake, I have annexed a copy of the roll of the parliament 1471, containing, 1^{mo}, A list of the bishops who appeared in that parliament; 2^{dly}, of the abbots; 3^{dly}, of the earls; 4^{thly}, of the lords of parliament; 5^{thly},

5thly, of the barons by tenure; and *lastly*, of the commissioners for the boroughs.

There appears upon record a form of creating peers, different from any above mentioned. One remarkable instance is an act of the 7th parliament, James VI. *anno* 1581, bearing, That the lands of Doun, &c. were feued by Queen Mary to Sir James Stewart of Doun, Knight, his heirs, &c. subsuming, that the said Sir James being descended of the royal blood, “there-
 “fore his Highness, with advice of his
 “three estates, erects, creates, unites, an-
 “nexes, and incorporates, all and fundry
 “the foresaid lands, offices, and other par-
 “ticulars above written, in an *lordship*,
 “to be called in all time coming *the lord-*
 “*ship of Doun*; decerning and ordaining the
 “said Sir James, his heirs and successors,
 “specified in the infestment, in all time
 “coming, to be called and intituled *Lords*
 “*of Doun*, who shall have the honour,
 “dignity, place and preheminance of a
 “lord of our Sovereign Lord’s parliament,
 “in all parliaments, assemblies, and other
 “conventions,

“ conventions, with his arms effeiring there-
 “ to; and giving unto him all honours,
 “ dignities and preheminencies, which per-
 “ tained, or of right and consuetude ought
 “ to pertain, to a lord of parliament.”

This form, it is presumed, has been introduced, in imitation of the old form of creating an earl, by erecting his lands into a county. And hence the purpose and use of erecting lands into a *dominium* or lordship. Patents in this form may undoubtedly be granted by the king, as well as other patents. This, in favour of Lord Doun, was done in parliament for the greater solemnity, the king being at that time under age.

It is certain, that the lords of parliament had no greater power or privilege in parliament than the barons by tenure had; yet as it was understood to be the king's intention, in creating a lord of parliament, to exalt the person honoured to a rank above that of a baron by tenure, the nation has all along submitted implicitly to the king's will,

will, as most nations do with regard to titles of honour bestowed by the sovereign. And there are two circumstances which probably had an influence to heighten the respect paid in consequence of such creation. The attendance of a baron by tenure in parliament, is a service, and not a matter of right; whereas, when one is created lord of parliament, the power of attending parliaments is bestowed upon him as a privilege. The other circumstance must have had still a greater weight in the imagination. The honour of a baron by tenure was annexed to the land, and went with it to the purchaser of the barony, along with the jurisdiction, and its other accessories. The frequent transmission of baronies from hand to hand, with the honours annexed, could not fail to depretiate the dignity, in the opinion of all men. A man who, after passing many years in an obscure rank, purchases an honour with his money, must lay his account, for some time, not to have great respect paid him. And though the respect paid to an old family, will run on a long time after the family-estate is gone; yet it

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must

must dwindle by degrees, till the family at last be lost in the common mass. It will be obvious, from these considerations, that territorial honour could not long stand its ground after the commerce of land was introduced; and it will be equally obvious, that this circumstance behoved to add a great lustre to the dignity of a lord of parliament, which was annexed to the family, and inseparable from it. Accordingly, after the lords of parliament were multiplied by frequent creations, the barons by tenure, who made no figure in comparison, tired of the expence of attending parliaments, without any return either of profit or honour, withdrew by degrees. In later times, the barons by tenure who attended parliaments, were mostly the eldest sons of the nobility, invested in lands, to intitle them to a seat there. And in fact, for forty years before the 1587, there is not to be found in the rolls of parliament, a single instance of a baron by tenure attending in parliament.

It was in this year 1587, that the statute
of

of James I. of Scotland was revived, requiring the small barons to send commissioners to parliament : and so little regard was had to barons by tenure in this act, that by an express clause, “ All freeholders of the
 “ the king, under the degree of prelates
 “ and *lords of parliament*, are to be warned
 “ by proclamation to be present at the
 “ chusing of these commissioners.” It was this act, then, which gave the finishing blow to barons by tenure, by depriving them of their seat in parliament, and thereby reducing them to the rank of small barons and freeholders, who have no other privilege, but to send representatives to parliament : and hence a *Scotch laird* has come to be in some measure a term of reproach, like a *French marquis*, or a *German baron*.

It remains only to be examined, by what means it happened, that the commerce of land, which has quite annihilated the honour of a baron by tenure, had not the same effect with regard to the dignity of an earl. It is clear from what is above said, that both of them were once territorial dig-

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nities,

nities, and that when the estate was aliened, the dignity went along with it. We may readily believe, that the dignity of an earl was pretty much obscured, by this means, as well as that of a baron; and we have tradition to confirm us in this opinion. Yet after personal honour was introduced, whereby we came to separate the dignity from the estate, the title of earl increased in repute, while that of laird, which was the title of a baron by tenure, dwindled away to nothing. When this matter is considered, a ready solution will occur. The introduction of that new class of nobility, called *the Lords of Parliament*, which had the effect to overshadow and obscure the barons by tenure, plainly contributed to exalt the earls. Place and precedence work strongly upon the imagination, because they are public and palpable marks of respect. The barons by tenure, such of them who had the greatest estates, or made the most remarkable figure, were generally created lords of parliament; and some of them were more highly exalted, being made earls. The body of territorial barons be-
ing

ing thus impoverished, by frequent draughts from it, came to be little respected. These barons withdrew by degrees from parliament, as finding nothing there to answer the expence of attendance ; and they were excluded altogether by the act 1587 ; which, in these circumstances, could not, at any rate, be reckoned a hardship, and possibly was carried through with their consent or good-liking. The removal of the barons by tenure from parliament, behoved to add a lustre to the lords of parliament, and still a greater lustre to the earls, who took place of them. And as by this time an earldom was considered as a family-dignity, as well as was a baronage by creation, the earls could not fail to preserve their superior rank in the minds of the people, as well as they did in the rolls of parliament.

King Robert's charter to Ranulph Earl of Murray.

ROBERTUS, Die gratia, Rex Scotorum, omnibus probis hominibus totius terræ suæ, salutem. Sciatis, nos dedisse, concessisse,

et hac præfenti carta noſtra confirmaffe,
 Thomæ Ranulpho, Militi, dilecto nepoti
 noſtro, pro homagio et ſervitio ſuo, omnes
 terras noſtras in Moravia, ſicut fuerunt in
 manu Domini Alexandri Regis Scotiæ præ-
 deceſſoris noſtri ultimo defuncti, una cum
 omnibus aliis terris adjacentibus, infra metas
 et diviſas ſubſcriptas contentis, incipiendo,
 videlicet, ad aquam de Spee ſicut cadit in
 mare; et ſic aſcendendo per eandem aquam,
 includendo terras de Fouchabre Rothe-
 nayks, Rothays et Bocharine, per ſuas rectas
 metas et diviſas, cum ſuis pertinentiis; et
 ſic aſcendendo per dictam aquam de Spee
 uſque ad marchias de Badenach; et ſic in-
 cludendo omnes terras de Badenach et Kyn-
 cardyn, et de Glencarn, cum pertinentiis, per
 ſuas rectas metas et diviſas; et ſic ſequendo
 marchias de Badenach uſque ad marchiam
 de Louchabre; et ſic includendo terras de
 Louchabre, de Maymez, de Lezharketh, de
 Glengarech, et de Glenelg, cum pertinentiis,
 per ſuas rectas metas et diviſas; et ſic ſequen-
 do marchiam de Glenelg uſque ad mare
 verſus occidentem; et ſic per mare uſque
 ad marchias boreales Ergadiæ, quæ eſt Co-
 mitis

mitis de Ros; et sic per marchias illas usque ad marchias Rossiaë; et sic per marchias Rossiaë quousque perveniatur ad aquam de Forne; et sic per aquam de Forne quousque perveniatur ad mare orientale: Tenendas et habendas dicto Thomæ, et heredibus suis masculis de corpore suo legitimè procreatis seu procreandis, de nobis, et heredibus nostris, in feodo et hereditate, in LIBERO COMITATU, ac in libera regalitate, cum quatuor querelis ad coronam nostram regiam spectantibus; et cum omnibus placitis et querelis, tam in communibus indictamentis, quam in brevibus placitabilibus; et cum omnibus aliis loquelis quibuscunque ad liberam regalitatem pertinentibus, vel aliquo modo pertinere valentibus, adeo liberè, quietè, plenariè, et honorificè, sicut aliqua terra infra regnum nostrum, in regalitate, liberius, plenius, quietius, aut honorificentius, dari poterit aut teneri; unà cum magna custuma nostra burgi de Inverniss, et coketo ejusdem, et libertatibus suis in omnibus, exceptâ tantummodo parvâ custumâ dicti burgi; cum plenaria potestate attachiandi, accusandi, et in omnibus ministrandi ac judicandi omnes
illas

illas dicti vicecomitatus injurias, dampna seu
 praejudicia facientes indebitè custumæ præ-
 dictæ, adeo liberè in omnibus, sicut nos
 vel aliquis ministrorum nostrorum ipsos at-
 tachiare, accusare, ministrare seu judicare
 potuimus, seu poterit, in præmissis; et quod
 dictus Comes, et hæredes sui, amerciamenta,
 excaetas seu forisfacturas inde contingentes,
 adeo liberè et quietè habeant et possideant
 in futurum, sicut nos, seu aliquis prædecesso-
 rum nostrorum, dicta amerciamenta, excaetas
 seu forisfacturas, aliquo tempore habuimus.
 Quare vicecomiti nostro de Invernisi, et ba-
 livis suis, ac præpositis et balivis dicti burgi
 qui pro tempore fuerint, ac ceteris quorum
 interest, firmiter præcipimus et mandamus,
 quatenus præfato Comiti, et heredibus suis
 prædictis, ac suis ministris, sint intendentes et
 respondentes, consulentes et auxiliantes, su-
 per his, si necessè fuerit, nostra regali poten-
 tiâ invocatâ, sine aliquo alio mandato nostro
 speciali interveniente. Volumusque et con-
 cedimus, quod dictus Thomas, et heredes sui
 prædicti, habeant, teneant, et possideant dic-
 tum comitatum, cum manerio de Elgyn,
 quod pro capitali mansione comitatus Mo-
 ralli
 ravie

raviæ de cetero teneri volumus et vocari,
 et cum aliis omnibus maneriis, burgis, villis,
 thanagiis, et omnibus terris nostris dominicis,
 firmis, et exitibus infra prædictas metas con-
 tentis, cum advocationibus ecclesiarum, cum
 feodis et forisfacturis, cum silvis et forestis,
 moris et maresiis, cum viis et semitis, cum
 aquis, stagnis, lacubus, vivariis, et molendi-
 nis, cum piscationibus tam maris quam aquæ
 dulcis, cum venationibus, aucupationibus, et
 avium aëriis, cum omnibus aliis libertatibus,
 commoditatibus, ayfiamenis, et justis perti-
 nentiis suis, in omnibus, et per omnia, tam
 non nominatis quam nominatis: quibus he-
 redibus dicti Thomæ masculis deficientibus,
 quod absit, volumus, quod dictus comitatus
 ad nos, et heredes nostros, liberè et integrè,
 ac sine aliqua contradictione, revertatur. Vo-
 lumus etiam et concedimus, pro nobis et he-
 redibus nostris, quòd omnes barones et
 libere tenentes dicti comitatus, qui de no-
 bis et prædecessoribus nostris in capite te-
 nuerunt, et eorum heredes, dicto Thomæ, et
 heredibus suis prædictis, homagia, fide-
 lities, sectas curiæ, et omnia alia servitia
 faciant, et baronias et tenementa sua, de
 ipso,

ipso, et heredibus suis prædictis, de cetero teneant: salvis tamen baronibus et liberè-tenentibus prædictis, ac eorum heredibus, juribus et libertatibus curiarum suarum hætenus justè usitatis. Volumus insuper et concedimus, quòd burgi et burgenfes sui de Elgyn, de Fores, et de Invirnarne, easdem libertates habeant et exerçant quas tempore Domini Alexandri Regis Scotiæ prædicti et nostro habuerunt; hoc solùm salvo, quòd de nobis tenebant sine medio, et nunc de eodem Comite teneant, cum eisdem libertatibus. Salvo etiam nobis, et heredibus nostris, in hac donatione nostra, burgo nostro de Invirness, cum loco castelli et terris ad dictum burgum pertinentibus, cum piscatione aquæ de Nifs, et cum molendinis aquæ ejusdem, cum sequela dicti burgi, et terrarum ad ipsum burgum tantummodo pertinentium: et salvis nobis et heredibus nostris fidelitatibus episcoporum, abbatum, priorum, et aliorum prælatorum ecclesiæ Moravienfis, et advocatione seu jure patronatûs ecclesiarum earundem, et eorum statu, in omnibus quem habuerunt tempore Regis Alexandri prædicti, et aliorum prædecessorum nostrorum

rum

rum Regum Scotiæ: excepto quod homines eorundem citati per nos ad defensionem regni nostri intendant vexillo, et sequi teneantur vexillum dicti Thomæ Comitis, et heredum suorum prædictorum, unà cum aliis qui vexillum Moraviæ sequi solebant antiquitus: faciendo nobis, et heredibus nostris, dictus Thomas, et heredes sui prædicti pro dicto comitatu, servitium octo militum in exercitu nostro, et Scoticanum servitium, et auxilium de singulis *davacis* debitum et consuetum, tantummodo, sine secta curiæ ad quamcunque curiam nostram facienda. In cujus rei testimonium, præsentī cartæ nostræ sigillum nostrum præcepimus apponi. Testibus Venerabilibus Patribus Wilhelmo Sancti Andreae, Willelmo Dunkeldensi, Henrico Aberdinenſi, Die gratia, Episcopis; Bernardo Abbate de Aberbrothock Cancellario nostro, Malcolmſo Comite Levenox, Gilberto de Haya, Roberto de Keth Mareſcallo Scotiæ, Alexandro Margus et Henrico de Sancto Claro, Militibus.

Diploma

*Diploma of an Earldom, containing the
form of Belting, &c.*

JACOBUS, Dei gratia, Rex Scotorum,
omnibus probis hominibus totius terræ
suæ, clericis et laicis, salutem. Cum di-
lectus noster consanguineus Robertus Do-
minus Seytoun, ex clarissima & illustrissi-
ma stirpe vetustaque de Seytoun familia de-
scenderit, quæ multis abhinc seculis per no-
stros felicitis memoriæ prædecessores optimo
dominorum merito dignitatem et honorem
liberi baronis et domini parlamenti regni
nostri Scotiæ consequuta est; cumque ma-
jores dicti consanguinei nostri, in omni officio
et fidelitate versus nos et prædecessores no-
stros firmiter permanserint; idemque con-
sanguineus noster antecessorum suorum me-
rita non solum adæquaverit, sed etiam exi-
miis suis virtutibus ita de nobis meritus sit,
ut regalis nostri status ac muneris dignitas et
munificentia postulent ne patiamur eum et
successores suos meritis honoribus et clari-
tudine destitui, sed potius ut egregie factis
honor etiam et claritas accedat; Noveritis
igitur

igitur nos, de consilio procerum, et digni regni nostri primatum, exigentibus præmissis, creasse, ordinasse, constituisse, et erexisse, tenoreque præsentium creare, ordinare, constituere, et erigere antedictum consanguineum nostrum Robertum Dominum Seytoun, et heredes suos masculos, Comites de Wentoun; eidemque Roberto, ac heredibus suis prædictis, nomen, statum, gradum, titulum, honorem, et dignitatem Comitis de Wentoun, in omnibus et singulis præeminentiis, dignitatibus, honoribus, et ceteris quibuscunque ejusmodi statui Comitis de Wentoun pertinere seu spectare valentibus, damus et concedimus: ipsumque dictum Robertum, et heredes suos prædictos, hujusmodi statu, gradu, titulo, honore, et dignitate Comitis de Wentoun, per cincturam gladii, ac unius cappæ honoris, et dignitatis, et circuli aurei circa caput positionem, insignivimus, investivimus, et realiter nobilitavimus. Tenend. et habend. nomen, statum, titulum, gradum, honorem, et dignitatem Comitis de Wentoun prædicti, cum omnibus et singulis præeminentiis, honoribus, et ejusmodi ceteris quibuscunque statui Comitis

de Wentoun pertinentibus, seu spectantibus, præfato Roberto Comiti de Wentoun, et heredibus suis prædictis, in omnibus et singulis parliamentis nostris, heredum et successorum nostrorum, publicisque conventionibus et comitiis, infra dictum nostrum regnum Scotiæ tenendis; necnon ut habeant ejusmodi voces, præeminentias, dignitates, status, honores, et loca, in omnibus, quæ aliquis comes dicti regni nostri ante hæc tempora melius, honorificentius, et quietius habuit, seu usus gavisus fuit, vel in præfenti gaudet et utitur: et quod dictus Robertus, et heredes sui præfati, successive vocitentur et nuncupentur Comites de Wentoun perpetuo in futurum, et quilibet eorum vocitetur et nuncupetur; ac ut comites parliamenti, et regni nostri antedicti tractentur, teneantur, et reputentur, ac quilibet eorum successive tractetur, teneatur, et reputetur. In cujus rei testimonium, præsentibus manu nostra subscriptis, magnum sigillum nostrum appendi mandavimus. Ex arce nostra Sancruciana, die decimo sexto Novembris, anno Domini millesimo sexcentesimo, coram his testibus, prædilectis nostris

consanguineis

consanguineis et consiliariis, Joanne Marchione de Hamilton, Comite Arraniæ, Domino Evan. &c.; Joanne Comite de Montrois, Domino Graham, &c. Cancellario nostro; Georgio Mariscalli Comite, Domino Keyt, &c. regni nostri Mariscallo: dilectis nostris familiaribus consiliariis, Domino Jacobo Elphinston de Barntoun, Milite, nostro Secretario; Ricardo Cokburne juniore, de Clerkintoun, nostri Secreti Sigilli Custode, Milite; Magistro Joanne Skene, nostrorum Rotulorum, Registri, ac Consilii, Clerico; Domino Joanne Cokburne de Ormestoun, Milite, nostræ Justiciariæ Clerico; Magistro Willelmo Scot de Elie, nostræ Cancellariæ Directore.

JACOBUS R.

Diploma of an Earldom of a later date, without any of the above forms.

ANNA, Dei gratia, Magnæ Britanniae, Franciæ, et Hiberniæ, Regina, Fideique Defensor: Omnibus probis hominibus,

ad quos præsentes literæ nostræ pervenerint, salutem. Quandoquidem nos, regio nostro animo perpendentes, nos nostrosque regios antecessores per plurima fidelia servitia a nobili et antiqua familia de Argyle accepisse, toties agnota in diplomatibus, aliisque magni momenti commissionibus, et muneribus plurimis hac præclara familia ortis, concessa, et quæ non minus sibi ipsis honorem, et patriæ commodum tribuendo, quam nobis nostrisque regiis antecessoribus approbantibus, gesta fuere; benignè statui-
mus, non solum servitiorum quæ hætenus egregiè præstiterunt, memoriam retinere, sed etiam eos ulterius excitare et animare, hæc facta prosequi et repetere, quæ nobis nunc placet remunerare, durabilem et insignem regii nostri favoris characterem conferendo, in fidelissimum nostrum Conciliarium Dominum Archibaldum Campbell, fratrem germanum Joannis Ducis de Argyle, ejusque heredes postea expressos, qui muneribus sibi hætenus commissis fideliter et diligenter functus est: Noveritis igitur nos, tanquam solus author et scaturigo honoris, fecisse, constituisse, et creasse, sicuti
nos,

nos, per has nostras patentes literas, facimus, constituimus, et creamus, dictum Dominum Archibaldum Campbell, Comitem, Vicecomitem, et liberum Parliamento Dominum, intitulandum et designandum Comitem et Vicecomitem de Islay, et Dominum Oran-say, Dunoon, et Arrosee, omni tempore futuro : Dando, concedendo, et conferendo, dicto Domino Archibaldo Campbell, et heredibus masculis ex suo corpore procreandis, titulum, honorem, ordinem, gradum, et dignitatem Comitis, Vicecomitis, et liberi Parliamento Domini, ut dictum est ; cum plenaria admodum potestate et authoritate illi, ejusque antedictis, eundem, cum omnibus et singulis prærogativis, præcedentiis, præeminentiis, et privilegiis eo spectantibus, possidere et frui, quibuscum nos eundem Dominum Archibaldum Campbell, ejusque antedictos, nobilitamus et investimus ; speciatim vero cum libero suffragio in parliamento. Tenend. dictum honorem, ordinem, dignitatem, et gradum Comitis, Vicecomitis, et liberi Parliamento Domini, cum omnibus prærogativis, præeminentiis, et privilegiis eo spectantibus, per eundem Do-

minum Archibaldum Campbell, ejusque antedictos, de nobis, nostrisque regiis successoribus, in omnibus parliamentis, ordinum conventibus, generalibus consiliis, aliisque congressibus quibuscunque, publicis seu privatis, in dicto regno nostro, tam plenariè adeoque liberè, in omnibus respectibus, quam quivis alius comes, vicecomes, et liber parliamenti dominus, simili titulo, honore, et dignitate, cum universis privilegiis aliisque ei spectantibus, usus et gavisus est, seu quovis tempore præterito, præsentis vel futuro, uti et gaudere poterit. Leoni porro armorum Regi, ejusque fratribus foecialibus, imperamus, ut præfato Domino Archibaldo Campbell, nunc Comiti de Islay, talia prioribus insigniis ejus gentilitiis additamenta, qualia hac occasione expediens et conveniens videbitur, dent et præscribant. Et declaramus et ordinamus hæc nostras parentes literas, magno nostro sigillo munitas, adeo validas et efficaces fore, dicto Domino Archibaldo Campbell, ejusque antedictis, pro possidendo prædicto titulo, honore, et dignitate, ac si cum omnibus ritibus et solemnitatibus, similibus occasionibus per prius usitatis,

usitatis, ille ejusque investiti et inaugurati essent; quocirca dispensavimus, perque præsentes in perpetuum dispensamus. In cuius rei testimonium, præsentibus magnum sigillum nostrum appendi mandavimus. Apud aulam nostram de Kensingtoun, decimo nono die mensis Octobris, anno Domini millesimo septingentesimo sexto, et anno regni nostri quinto.

Per signaturam manu S. D. N. Reginae
supra scriptæ.

Diploma of a Lord of Parliament.

CAROLUS, Dei gratia, Magnæ Britanniae, Franciæ, et Hiberniæ, Rex, Fideique Defensor: Omnibus probis hominibus suis ad quos præsentes literæ pervenerint, salutem. Sciatis, quia nos considerantes dilectum nostrum Dominum Jacobum Sandilands de St Monance, Militem, ejusque prædecessores, præclaros et illustres viros, ac probos et fideles subditos, illustrissimis nostris progenitoribus esse et fuisse, et multa præclara obsequia

sequia et servitia nobis, et nostris præclarissimis prædecessoribus Regibus Scotiæ, eternæ memoriæ, in eorum emolumentum, ac reipublicæ dicti regni nostri incrementum, omnibus temporibus retroactis, tam tempore pacis quam belli, præstitisse; et nos, e regia nostra et gratiosa beneficentia, volentes animum addi dicto Domino Jacobo Sandilands, ad insistendum vestigiis illustrorum ejus prædecessorum, quoad servitia et obsequia nobis, et posteris nostris, præstanda, conferendo in eum titulum, dignitatem, et ordinem subscriptam, tanquam specialem tesseram regii nostri favoris, cum dictus Dominus Jacobus ex antiqua et splendida familia de St Monance oriundus sit, cui pro præfente luculentæ opes suppetunt ad obeundum et fovendum ordinem et gradum Domini, infra dictum regnum nostrum, omni tempore futuro: Igitur, pro diversis aliis magnis respectibus, causis, et rationibus, nos moventibus, ex autoritate nostra regali, et potestate regia, dedimus, concessimus, et disposuimus, tenoreque præsentium damus, concedimus, et disponimus, memorato Domino Jacobo Sandilands, ejusque heredi-

bus

bus masculis ex corpore suo legitimè procreatis, seu procreandis, titulum, stylum, gradum, locum, honorem, dignitatem, et nobilitatis ordinem, *Domini*; ac damus, concedimus, volumus, decernimus, et ordinamus, quod ille, ejusque hæredes et successores prædicti, indigitabuntur, designabuntur, vocitabuntur, et nominabuntur, *Domini de Abercrombie*, omni tempore futuro, cum loco et suffragio in omnibus publicis et privatis conventibus, parliamentis, similiter adeoque liberè in omnibus respectibus sicut quicumque alius liber dominus aut baro parliamenti infra dictum regnum nostrum; una cum omnibus privilegiis, dignitatibus, et immunitatibus quibuscunque, ad similem locum spectand. et pertinen.; cum potestate memorato Domino Jacobo, ejusque heredibus masculis antedictis, gaudendi et fruendi dicto stilo, loco, ordine, honore, et dignitate *Domini*, omni tempore futuro; cum omnibus præcedentiis, præminentiis, privilegiis, immunitatibus, aliisque commoditatibus, eo competentibus, in omnibus nostris, et successorum nostrorum, parliamentis, conventibus, consiliis, aliisque locis,

locis, vel actionibus quibuscunque, privatis seu publicis; ac utendi, gaudendi, et fruendi jure suffragii, prærogativæ, gradus et loci, ac status domini et baronis, in omnibus, sicut quicunque alius ejusdem statûs gavissus est, et possedit, aut de præsentî possedit et gaudet; quodque dictus Dominus Jacobus, ejusque heredes masculi, et eorum singuli, successivè designentur et indigitantur Domini de Abercrombie perpetuo; utque sic reputentur, habeantur, et agnoscantur, ac omni honore et reverentia dominis parliamenti competentibus afficiantur. In cujus rei testimonium, præsentibus magnum sigillum nostrum apponi præcepimus, apud Carisbrook, duodecimo die mensis Decembris, anno Domini millesimo sexcentesimo quadragesimo septimo, et anno regni nostri vigesimo tertio.

Creation of Patrick Lord Halis to the dignity of Earl of Bothvile.

IN parlamento excellentissimi Principis, ac Domini nostri metuendissimi, Domini
Jacobi

Jacobi Quarti, Dei gratia, Regis Scotorum illustrissimi, tento apud Edinburgh, in prætorio ejusdem, die Veneris, decimo septimo die mensis Octobris, anno Domini millesimo quadringentesimo octogesimo octavo, coram præfato supremo Domino nostro Rege, ibidem personaliter sedente.

Quo die, idem supremus Dominus noster Rex, in eodem parlamento, præsentibus suis tribus statubus, et cum eorundem consensu, favore, et consilio, sua regia Majestas recognoscens, divino numine, se regni fastigia et præeminentias, hereditatis jure, suscepisse, idque sui officii esse noscatur viros nobiles qui suo honori, et reipublicæ dignitati, plurimum affuerunt, præmiis tollere, et ad altiores dignitates elevare, quo alii sui subditi unius virtutem imitantes, se ad similia præparent, et remunerationis officio disponant; sua, ea propter, sacra Majestas regia, volens viros virtute præditos, regali munificentia et liberalitate, nobilitatis proprietate nitescere, dominium de Bothvile fecit et erexit in unum liberum comitatum, pro perpetuo, futuris temporibus, Comitatum

tum de Bothvile nuncupandum; et dicto comitatui dominium de Creightoun; cum tenentibus, tenandriis, et libere tenentium servitiis, de Bothvile et Creightoun prædictis, una cum advocationibus et præsentationibus præpositurarum, præbendarum, et capellaniarum de Bothvile et Creightoun, una cum piscationibus aquæ de Clide, et quadraginta mercatis terrarum Forestæ de Bothvile, cum omnibus aliis suis pertinentibus, dependentibus, juribus, et annexis, univit et incorporavit: Et eundem comitatum de Bothvile, cum dependentibus, annexis, et pertinentibus antedictis, suo dilecto familiari consanguineo et consuli Patrio Domino Halis, pro suo fideli legalitate, obsequio, et obedientia præstitis; et, in compensatione laboris et expensarum, dampnii, vitæ et hereditatis periculi, ob regium honorem sumptorum, pro regia serenitate, et reformatione justitiæ privorum consilio oppresso, concessit et donavit in suo parlamento prædicto: eundem Patrium Dominum Halis in Comitem creavit, et Comitis titulo decoravit, per præcinctiorem gladii, ut moris est; ita quod ipse,

et

et sui heredes, pro perpetuo, futuris temporibus, Comites de Bothvile vocentur, Comitisque dignitate fulgeant.

Ratification of Alexander Earl of Glencairn's patent.

CAROLUS, Dei gratia, Magnæ Britanniae, Franciæ, et Hiberniæ, Rex, Fideique Defensor: Omnibus probis hominibus totius terræ suæ, clericis et laicis. Sciatis, quia nos compertum habentes, quod quondam noster illustrissimus attavus Jacobus Tertius, Dei gratia, Rex Scotorum, perennis memoriæ, per suas literas patentes sub suo magno sigillo, de data, apud Edinburgum, vigesimo octavo die mensis Maii, anno Domini millesimo quadringentesimo octogesimo octavo, expeditas, pro causis inibi specificatis, dedit et contulit in quondam Alexandrum Comitem de Glencairn, Dominum Kilmaires, prædecessorem prædilecti nostri consanguinei Willielmi nunc Comitis de Glencairn, Domini Kilmaires, titulum, honorem, et dignitatem Comitis de Glencairn, Domini
L Kilmaires,

Kilmaires, omni tempore affuturo nuncupandi, prout dictæ literæ patentes, de data prædicta, latius proportant; idque, secundum easdem, præfatus quondam Alexander Comes de Glencairn, sui que successores, continuo, a data prædicta literarum patentium dictarum, honore et dignitate Comitis de Glencairn fruebantur, et sic per nostros nobilissimos progenitores in parliamentis, conciliis publicis, conventibus, et comitiis, æstimabantur; et nos memoria nostra recolentes bonum, gratum, et fidele servitium, nobis, et illustrissimis nostris prædecessoribus, per dictos Comites de Glencairn, suosque prædecessores, omnibus temporibus elapsis, absque aliqua violatione fidei aut interruptione, præstitum et impensum: Idcirco nos, nunc diu post nostram perfectam ætatem viginti quinque annorum completantur, et post omnes nostras revocationes, tam speciales quam generales, RATIFICAVIMUS, approbavimus, et confirmavimus, tenoreque præsentium, ex nostra scientia proprioque motu, ratificamus, approbamus, ac pro nobis et successoribus nostris, pro perpetuo confirmamus, præfatas literas patentes,

per

per dictum quondam Jacobum Tertium Scotorum Regem, sub suo magno sigillo, datas et concessas præfato quondam Alexandro Comiti de Glencairn de præfatis, titulo, honore, et dignitate Comitis, cum omnibus aliis literis patentibus, scriptis, et evidentiis, præfato quondam Alexandro Comiti de Glencairn, vel alicui ipsius prædecessorum aut successorum, quoad attinet dictum honorem et dignitatem Comitis tantummodo, datis et concessis, in omnibus et singulis punctis, articulis, clausulis, et circumstantiis quibuscunque: Ac volumus et concedimus, et pro nobis et successoribus nostris decernimus et declaramus, Quod hæc præsens nostra generalis ratificatio est et erit tam valida, efficax, et sufficiens, ac si prædictæ literæ patentes, de verbo in verbum, præsentibus inferentur; quocirca nos dispensavimus, tenoreque præsentium dispensamus, nunc et in perpetuum: Præterea volumus et concedimus, ac pro nobis et successoribus nostris decernimus et declaramus, Quod præfata literæ patentes, factæ et concessæ per dictum quondam Jacobum Tertium, Scotorum Regem, dicto quondam Alexan-

dro Comiti de Glencairn, et hæc præfens nostra ratificatio earundem sunt et erunt validum, perfectum, et sufficiens jus et titulus, unde præfatus Willielmus nunc Comes de Glencairn, heredes sui et successores, omni tempore futuro, libere, quiete, et pacifice, præfatis honore et dignitate Comitis, secundum validitatem prædictarum literarum patentium, fruentur et gaudebunt; et nos, per præfentes, in verbo principis, literas patentes supra specificatas, et hanc præsentem nostram confirmationem earundem, in proximo parlamento infra regnum nostrum Scotiæ tenendo, ratificaturas et approbaturas fore, fideliter promittimus. In cujus rei testimonium, præsentibus magnum sigillum nostrum apponi præcipimus, apud Aulam nostram de Oatlandis, vigesimo primo die mensis Julii, anno Domini millesimo sexcentesimo trigesimo septimo, et anno regni decimo tertio.

Per signaturam manu S. D. N. Regis
supra scriptam.

Roll of the Parliament 1471.

*Die vero xviii Februarii,
Præfente dicto Supremo Domino nostro REGE,
una cum Episcopis, Abbatibus, Prioribus,
necnon Nobilibus, Ducibus, Comitibus,
Dominis, Baronibus, Libere-tenantibus,
ac Burgorum Commissariis, subscriptis,
viz.*

Alexandro Duce Albaniae, &c.

Episcopis

Dunkelden,
Aberdonen,
Rossen,
Orchadeny.

Prioribus

Portmowok,
Rostinot,
Coldinghame,
Mae.

Abbatibus

Aberbrothoc,
Melrofs,
Haliruidhouse,
Pafleto,
Scona,
Driburgh.

Comitibus

Cancellarius,
Errol,
Mershell,
Huntle,
Crawfurd,
Mortoun,

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Comitibus

Comitibus

Ergile,
Roths.

Dominis

Innermeth,
Erskin,
Haliburton,
Setoun,
Borthwic,
Dernle,
Lindissay,
Gray,
Forbes,
Kilmawrs,
Kennedy,
Hamiltoun,
Monypenny,
Saltoun.

Baronibus

Sanquhar,
Bewfort,
Haltoun,
Craigmiller,
Lestalrig,
Dundas,
Bargany,

Bafs,

Caldor,

Lufs,

Tariglis,

Elzetstoun,

Ruthven,

Sauquhy,

Elphinstoun,

Guthrie,

Torthorwald,

Corstorphin,

Edmunstoun,

Dalwolsy,

Bothiok,

Petarrow,

Abyrcrumby,

Erolet,

Rusky,

Carns,

Cranston,

Halkerstoun,

Boyle,

Ker,

Gask,

Dron,

Hume,

Balcolmy.

Commissariis

Commissariis

Edinburgh,	-	{ Zong,
		{ Boncle,
Aberdeen,	- -	Knows,
Stirling,	- - -	Wal. Stewart,
Linlichqw,	- -	{ Fowlis,
		{ Forrest,
Haddingtoun,	- -	Girnlaw,
Dumfries,	- -	Welch,
Are,	- - -	Multrar,
Dundee,	- -	{ Monorgund
		{ and
		{ Mal. Guthre.

ESSAY

E S S A Y IV.

SUCCESSION OR DESCENT.

INTRODUCTION.

SUcceſſion, or the tranſmiſſion of eſtates from the dead to the living, is a ſubject which makes a great figure in hiſtory, as well as in law. It is a ſubject full of curioſity; for, depending moſtly upon remote principles in the imagination, it ſhows, in a multitude of inſtances, how much we are governed by feelings, which, abſtractly conſidered, appear to be of the weakeſt ſort. One effect of this indeed is, that there are no univerſal rules of ſucceſſion: different maxims are not only embraced in different countries, but have been eſtabliſhed in the ſame country at different periods; ſo that ſucceſſion, like the faſhion, has hitherto been in a conſtant fluctuation. We are apt to think, that the rules are now ultimately ſettled without fear of change. But ſo, in all probability, did our forefathers,
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three or four centuries ago; for it is a common mistake, from any short specimen, to infer a constant uniformity. However this be, it is of great use to trace the rules of succession through their different changes. A lawyer possibly may think his stock of knowledge sufficient, if he be acquainted with the rules which at present obtain in his own country. But a man must pierce deeper, if he would form any clear judgment about many old transactions of the greatest importance. In the history of England, of France, of Scotland, and indeed of most European nations, we meet with frequent disputes about the succession of kingdoms, and of other sovereignties, which we are altogether at a loss to comprehend, because such disputes exist not at this day. Who imagines that a second son or daughter can have any pretensions to a crown, so long as there are issue existing of the eldest? Yet this very thing was insisted on in the famous trial about the crown of Scotland, betwixt Bruce and Baliol. We are apt to imagine, that a second son who makes so idle a claim, must have other arguments

guments to rely on, than what are founded on the laws of his country: not considering, that the right of representation, though at present universally established, was but creeping into practice in those days. In former ages the right of representation was not regarded; witness Lewis the second son of Charlemain, called to the succession of the crown of France when there was existing the son of an elder brother. Don Sancho, son of Alphonso King of Castile, succeeded his father, and excluded his nephews, Alphonso's grandsons by a former marriage. This was in the year 1284. Instances of this nature, and there is a multitude of them, make it evidently an essential qualification in a historian, to be acquainted with the laws and antiquities of the country he writes of. Is it not surprising, that Father Daniel, relating the foregoing event, in the history of France, passes it slightly over, without any observation, more than if it were a familiar incident? So dry an historian cannot fail to perplex his readers. Perhaps the father was himself perplexed, and chose to hide his ignorance by
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his silence. Rapin is a most judicious historian; but he is frequently at a loss, through want of a sufficient knowledge of the constitution of England. In his history are introduced many disputed successions, where the facts are stated with great accuracy: but an intelligent reader will perceive, that he is generally at a loss when he endeavours to form a judgement about the point of right, which must be the case with an author who is not intimately acquainted with the notions of succession entertained in the age and in the country he writes of. The following account is therefore given with a view to answer the purposes of history as well as of law.

P A R T I.

AFTER property was recognised and firmly established, the matter of succession could not be long neglected. The proprietor's will would be acknowledged as of sufficient authority to regulate his succession

cession*. And if the estate was left *in medio*, without a will to direct the succession, the proprietor's children, for whom he was bound to provide, would naturally be suggested to

* I am aware, that while property was in its infancy, it was doubted whether a man's will, in whatever manner declared, could have the effect to regulate his succession. When a piece of ground was taken out of the common, and cultivated by the occupier for the use of himself and family, it soon came to be settled, that this person was to have the undisturbed possession for his life; otherwise farewell to labour and industry. But as his interest in the subject behoved to die with himself, it was at first not readily conceived how his power over the subject should continue after his interest was at an end, or at any rate subsist after he was dead and gone. This difficulty arose from the limited notion which originally was entertained of property. In early times property was not much distinguished from what is now called *usufruct*. No more was conceived in property, but the unlimited use of the subject. But experience pointed out a more extensive idea of property. Mankind are fond of power, especially over what is their own; and it came to be considered as an unreasonable hardship, that the occupier should not have the power of disposal. This power was relished, and became law, because it was every one's interest that it should be law. And when once this power was understood,

to the mind. Hence the primary rule of succession, that children succeed *ab intestato*. But what if there be no children? The spirit of the rule will apply to the nearest relations: for after a man's death, his children, or other relations, will be considered as having a more intimate connection with his effects than strangers; and, by a natural transition of ideas, the property that was in the deceased, will be readily transferred to his kindred.

Children, as being the nearest relations, come first under view. And with respect to understood, it came by degrees to be extended the utmost length it was capable of. Thus Grotius, *lib. 2. cap. 6. sect. 14. Possum enim rem meam alienare, non pure modo, sed et sub conditione; nec tantum irrevocabiliter, sed et revocabiliter, atque etiam retenta interim possessione et plenissimo fruendi jure. Alienatio autem, in mortis eventum, ante eam revocabilis, retento interim jure possidendi ac fruendi, est testamentum.* Therefore, when we read of ancient laws among particular nations, introducing the power of making a testament, we must not consider these laws as bestowing peculiar privileges, but only as authorizing a practice which was the consequence of an enlarged idea of property.

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them, a subtle question occurs, Whether, by the law of nature, daughters are intitled to succeed equally with sons? One thing is clear, that where-ever the notions of a family have got firm footing, female succession must be excluded, since a woman, by marriage, making part of her husband's family, cannot naturally carry on the idea of that of her father. But the notions of a family are derived from male succession, and are not suggested by any natural principle. If we lay aside the notions of a family, propinquity must also be laid aside, which throws an equal weight into either scale. What, after this, readily occurs, to determine the question, is, that women require food and raiment as well as men do, and are equally capable of enjoying riches. It is true, that among all nations, and at all times, the male has been esteemed the *dignior persona*: but this consideration can never be of weight to thrust out females altogether; and once admitting them to a share, they must have an equal share, as there are no possible *data* in this case to fix any other proportion.

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This rule accordingly is observed among all nations, with regard to succession in moveables. In most countries females have been excluded from succeeding to land. But this was the effect of distinguishing mankind into tribes and families, which, though not original in nature, crept pretty early in. It was evidently so among the Jews, and among the Romans, where the distinction betwixt different tribes was so remarkably preserved, that by law a person of one tribe could not succeed to one of another. And in other countries, where these distinctions were not so much regarded, war in early times being the chief occupation, and land the chief object of conquest, it was natural that males only should have the possession of land, which they only could defend. But even in this case, it must be observed, that the whole sons succeeded equally; which was departing as little from the law of nature as the circumstances of the case would permit.

The right of primogeniture was a creature of the feudal law. The possession,

not the property, of land, was given for personal service; and when it came to be the practice to extend such grants in favour of children, the master or superior having no claim but to one man's service, the eldest son came naturally into the father's place. For as in tracing out a family, the mind descends by degrees from the father, first to the eldest son, and so downwards in the order of age, the eldest son, where but one can take, is the first who presents himself. And as the feudal law gained ground, and spread itself over all Europe, the right of primogeniture came by degrees to be a general rule in the succession to land-estates, which were held by military service.

As this was evidently the reason for preferring the eldest son in a military feu, the same reason, in my apprehension, behoved to take place in burgage-land, which being given for the service of watching and warding, naturally descends to the eldest son, if one only be bound to perform the service. But soccage-tenure stood upon a different footing. Where the possession of
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Land is given to a man, not for personal service, but upon condition of delivering to the landlord yearly a certain quantity of corn, or of other fruits, which are the produce of the ground, there appears no good reason why the benefit of such a contract, if there be any benefit, should not accrue to all the family equally. And yet, so far as we can discover, sons were always preferred to daughters in the succession of soccage lands. All I have to suggest is, that in times of ignorance and barbarity, when strength of body and personal courage are the only virtues, women are little regarded. And the practice of debarring them altogether from succession to military feus, which made the bulk of the property of the nation, did probably pave the way for preferring the males to the succession of other estates. This conjecture appears natural; but it is more difficult to be explained, by what means it happened, that the equal succession of males in the soccage-tenure has gone quite into disuse, and given place to the right of primogeniture. This revolution is not taken notice of by our historians, nor ac-

counted for by our lawyers. One thing is certain, that equality among males, in the descent of foccage-lands, was in vigour so late as the *Regiam Majestatem*. See *R. M. l. 2. c. 27*. We must venture another conjecture here. After the days of David II. during whose reign the *Regiam Majestatem* was compiled, peaceable times brought on new manners. Riches came to be in greater request than military prowess, and many superiors were willing to take rent in place of service. This in some measure confounded the distinction betwixt military and foccage tenures, so as by degrees to make one rule serve for the succession in both. And as military feus were by far the most frequent, the right of primogeniture, which took place in most cases, became at last universal.

But we have yet other difficulties to struggle with. Though the succession to foccage land came after this manner to be confined to the eldest son; yet no alteration was made in the female succession. Females continued to succeed all equally, and do so
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at this day. This at first sight must appear whimsical, and not readily explicable. If the right of primogeniture was so universal a principle, how came it to stop short, and not to obtain in every case? And it is evident, where there are daughters only, that the mind, in tracing out the line, descends to the eldest, as naturally as to the eldest son where there are male issue. It is probable, that the socage tenure was not far behind the military tenure in point of time; and if so, the rules of its succession were settled before the right of primogeniture came to take such fast hold of the mind, as to be reckoned a sort of natural principle. Accordingly we find, that though males were preferred in socage-tenure, yet in other respects, the law of nature took place, by calling the males all equally; and failing them, the females. But the following circumstance must be attended to, that though, in progress of time, the right of primogeniture came to be established as a general law, and in some sort as a natural principle; yet there was no example of this right taking place, except among males.

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It was this very consideration, in all appearance, which led our forefathers, in their superficial reasonings, to lean to the right of primogeniture in all cases of male succession, without thinking of incroaching upon the established rules of female succession: not at all attentive to what is fundamental in this matter, in the *first* place, that the right of primogeniture depended upon the nature of the military holding, which therefore could not, with any shew of reason, be extended to holdings of a different kind; nor, in the *second* place, that if the privilege of primogeniture were to be the sole rule, it ought to have place in the succession of females, as well as of males.

After the feudal law came to a standard, the succession in military feus was regularly extended to the male descendents of the original vassal, and after these were all exhausted, the fee returned to the superior. There was no place for collateral succession. It might happen, that collaterals to the deceased vassal did succeed; but it was
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not as collaterals, but as heirs-male of the body of the original vassal. See l. 2. *Feud. t. 11.*

In handling a subject where we have so few principles to direct us, and where these principles are not of the firmest sort, it is not wonderful that difficulties crowd in on every side. So far we have proceeded upon a reasonable foundation, that in the succession of military feus, preference is given to the eldest son. But now the question is, Whether the eldest son's male issue ought, in all events, to be also preferred? A military vassal dies leaving issue a younger son, and a grandson by his eldest son; the doubt is, Whether the son or grandson be heir? The son is undoubtedly the next in blood, and therefore, by the law of nature, ought to be preferred; and this accordingly appears to have been the law in the days of Charlemain, whose second son Lewis was called to the succession as lawful heir, though Charlemain had by his eldest son a grandson, of perfect age when the succession opened. On the other hand, the circumstances

cumstances of the grandson are to be considered. He is born, and perhaps educated, with the prospect of succeeding to the estate, after the death, first of his grandfather, and then of his father. It cannot but be reckoned a hardship to be deprived at once of all his hopes, by the unexpected accident of his father's death before that of his grandfather. Such are the circumstances which weigh one against the other; and therefore it is not surprising to find sensible writers taking different sides in a question so dubious. Perhaps there is not one question in law, which hath afforded a greater field, not only for law-suits, but for bloody and cruel wars. Instances are frequent in the histories of France and England: and the celebrated struggle about the crown of Scotland, betwixt Bruce and Baliol, had no other foundation. Baliol was descended of the eldest sister, Bruce of the second. But then it was urged in behalf of the latter, that he was one degree nearer to the common stock than his competitor, and consequently nearer in blood. This matter is now settled, and has been for ages, in favour of the descendants

scendents of the eldest: but it was reckoned a doubtful case, even so late as the time when the *Regiam Majestatem* was composed, as will appear from the 33d chapter of the second book.

It has been disputed, whether the same rule ought to hold in the succession of collaterals. The ground of the doubt is, That as a man is never without hope of issue, none of his collaterals can be born or educated with the hope of succeeding to him. This circumstance being removed, which preponderates in the former case, it may be thought, that there is nothing to weigh against the right of the nearest agnate. Upon this ground it was, that after the death of Henry III. of France, the league set up the Cardinal of Bourbon as heir to the crown, against his nephew the King of Navarre, afterwards Henry IV. For though Henry was the son of the elder brother, yet the Cardinal, the younger brother, was one step nearer to the common stock. It is extremely probable, had cases of this nature first occurred, that the nearest agnate would

would have been preferred; and it is equally probable, had this once been established as the rule, though occurring only in collateral succession, that it would have been applied to the case of descendents, without regard to their hope of succession. But instances first occurring, as readily would happen, in the case of descendents, the decisions given in favour of the eldest son's descendents, established a sort of general rule, which was afterwards applied to the case of collaterals.

Thus we see after what manner the rules of succession have been established, not only from very slender circumstances, but in some measure from accident. Had the foregoing question first occurred in collateral succession, probably we should never have heard of this privilege given to descendents, which lawyers call *the right of representation*. But as this privilege was first established in favour of descendents, it was held a general rule, and applied to the case of collaterals, though without the same foundation. But this will not be
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thought strange, when that natural propensity is considered which prompts us to act by general rules, a propensity so strong as scarce with patience to regard any variation of circumstance.

And here we have an opportunity to consider a peculiar sort of argument, the great resource of lawyers, when they are pressed with difficulties on any subject. Cases frequently occur, which, being exceptions from the general rule, must be governed by a rule peculiar to themselves: but as mankind are addicted to general rules, and as the indolence of lawyers makes it a task too hard for them to trace out all the rules which govern particular cases, they have invented an easy method to bring all the exceptions under the general rule; which is, by supposing the fact to have happened otherwise than it did. And this they justly term a *fiction juris*. Thus, for example, in the Roman law, a citizen who was taken captive by the enemy, lost the *jus civitatis*, and all the privileges attending it. This general rule was establish-

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ed among them. But supposing the captive to have made his escape, or to have recovered his liberty by some other lucky accident, it would have been an hardship intolerable, that this man, without a fault, should be forfeited of all his rights and privileges. The rule, it is evident, could not be extended to this case. But what was to be done? for lawyers are loath to part with a general rule. Instead of making a rule for cases of this nature, they extricated themselves out of the difficulty, by supposing, forsooth, that this man had never been out of the city; and this is termed the *jus postliminii*. The Roman lawyers are full of such fictions; and the moderns, their humble imitators, have followed them too faithfully. Thus, upon the subject under consideration, it is justly established as a general rule, that the next in blood succeeds. When the next in blood dies before the succession opens to him, the privilege given to his descendants is obviously an exception from this general rule. But to supply this defect in the rule, the descendent is supposed, by a fiction of law, to come in place of the deceased,

deceased, to be as it were the same person with him, and intitled to claim the succession, as he could have done had he been alive. Let us hear our countryman Craig upon this fiction: *Jus repræsentationis est, quoties posterior, non ex sua, sed ex prioris persona, quam repræsentat, jus successionis petit; veluti, præmortuo filio, cum nepos aut neptis ad successionem vocantur: non enim ratione sui, sed patris eorum, i. e. filii defuncti, successio ad eos pertinet; neque hi ex sua persona hereditatem, aut ejus partem, possunt petere, sed tantum ex persona patris; (nam ex sua non admitterentur, cum filii ex eodem parente supersint, qui horum sunt patrui, et sic agnati propiores defuncti): et hoc est ejus personam repræsentare.* This, as has been observed, is a very commodious method of solving difficulties. But however commodious, I will venture to say, it affords little satisfaction to the mind. For the question still recurs, Why is this fiction introduced? Why should there be a right of representation as to lands, more than as to moveables? To say no worse of it, it darkens instead of clearing the subject-matter. Is it not

more natural, and almost as easy, to set forth, in plain terms, the hardship it would be upon the eldest son's descendents, to be cut out of their hope of succession by the premature death of their father; and that this consideration in such cases prevails over the right of propinquity?

It remains only to be observed upon this head, that the foregoing plan of succession, with respect to military feus, rests upon three general rules: 1st, That the eldest male is the favourite of the law, and preferred to the succession. 2^d, That the estate gradually descends from the elder brother, failing issue, to the younger brothers. And 3^d, That it descends to every one of the male issue of the elder brother, before it comes to the younger brother or his issue.

Though what is above set forth was the common course of succession in military feus, we have, however, no reason to doubt that it was often varied by special destination. In strict law the vassal's right
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is but an *usufruct*, and it was late before he was considered as proprietor. The superior therefore behoved to have a great sway in chusing an heir for his vassal; especially in early times, before feus were regularly extended to heirs. That son, without regard to primogeniture, who was the most active in war, would often be preferred. And even in after-times, when succession in feus was more firmly established, examples could not be wanting of setting aside the eldest son, because of defects in body or mind; or perhaps because he was intended for the church, or addicted to the arts of peace. This gave a beginning to entails, by altering the order of succession, and preferring a younger son and his male descendents, to the elder sons and their descendents.

But now supposing that a younger son, thus preferred to serve the superior in place of his father, dies without male issue, the question is, Who is his heir in the feu, his elder brother or his younger? There will perhaps not be found in law, a speculation

more curious, than what this doubt gives rise to. Let us examine attentively what considerations occur upon this subject. As it is probable, from the circumstances of the times, that examples of such entails were frequent, even in the infancy of the Feudal law, we cannot well suppose, that the rules above laid down, touching the succession to military feus, were very firmly established, when there was first occasion to determine the point under consideration. But supposing these rules to be firmly established, it must have been obvious, at first view, that they did not apply to this case. The right of primogeniture, and the gradual descent, relate only to the father's succession; and extend no farther than to ascertain, that where a man dies *intestate*, his estate goes first to the eldest son and his issue; whom failing, to the second son and his issue; and so downwards. But there is nothing in this regulation, where a man dies without issue, to determine who shall be his heir, his elder or younger brother. These rules therefore must be laid aside, as of no use to support the elder brother's claim.

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On the other hand, the will of the superior or father, in excluding the eldest son, operates not in favour of the younger, since it goes no farther than to prefer the second son to the eldest, by no means to prefer the third son. And at any rate, laying aside the eldest son, because of his unwillingness or incapacity, an exclusion which is founded merely on personal considerations, cannot be extended against his issue.

These points being discussed, one thing occurs in favour of the elder brother. In order to ascertain the propinquity, it is natural to lay hold of the principle which connects the brothers together, and this is their relation to their father. When we have carried our thoughts to him, we naturally descend to the eldest son, as the first step in the progress of the mind through the family. And thus, as the eldest son comes next in view, after the connecting principle, it will not be strange, in a cursory view of the matter, to prefer him, as a step or degree nearer to the common stock than his competitor is. I shall have occasion to show hereafter,

hereafter, that this way of thinking had its effect in another case of succession. But as, here, custom has given the preference to the younger brother, there must be some other principle in our nature, or some peculiarity in our way of thinking, sufficient to overbalance that now suggested: for things established merely by custom, without the influence of external circumstances, must certainly have a foundation in nature.

In searching for this principle or peculiarity, let us premise one reflection. It will not be thought strange, that the rules of succession, derived chiefly from personal connections, should, like these connections, rest upon remote principles; principles which, at first sight, may appear of little weight, which are little attended to, and which, notwithstanding, have their effect by influencing the mind. And now to our subject; in order to explain which, we must take a pretty large compass, being to treat of things which are not the subject of common observation. In tracing out the actions of our mind, the following observations will

will be found just. *1st*, In viewing objects, we are disposed to take them regularly in their order; and we cannot, without effort, jump from one at hand to one at a distance, neglecting those that are intermediate. Whether this be the effect of a natural principle, or of habit, belongs not to the present subject. I shall only observe, that the progressive motion, through the points of space, of all moving bodies, is sufficient to bring on a habit, and to accustom the mind to the like progressive motion in surveying its objects. *2^d*, We are not less influenced by the succession of time than of place. We cannot easily be brought to contemplate an object distant in point of time, without running over the intermediate objects. *3^d*, As the tendency of all bodies is to move in a straight line, and in one direction, as nature is going on in its course without any retrograde motion, this tenor of things about us, communicates to our minds the like tendency. However this be, it is certain, that we more readily pass to the contemplation of a future object, than of one that is past. The progression of the thought, in going
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from a present to a past object, appears unnatural, as if we were walking backward : but when we turn our thought to a future object, our fancy flows along the stream of time, and arrives at the object, by an order which is agreeable, because it is natural.

These observations will give light to our subject. Let us recollect, that it is the estate of a middle brother which is in dispute. If from him we turn our thoughts to the elder, we feel a sort of retrograde motion, contrary to the course of nature ; which, if not positively disagreeable, is much less agreeable than the natural order of descending to the younger brother. This circumstance weighs in favour of the younger brother. The transition of the thought to the younger, being more easy than the transition to the elder, gives an impression of a more intimate connection or relation betwixt the second and third brother, than betwixt the second and eldest. For it is a law in our nature, that the connection among objects is ever considered to be in proportion to the facility

facility of the transition of our ideas from the one to the other.

It will perhaps be observed, that principles like what I have been tracing out, which at best make but a slender impression, are little to be relied on, in our reasonings upon any subject. I readily yield, that in resolving the present question, no man would hesitate a moment to divide the middle brother's estate betwixt the elder and younger, as the equitable method. But what forces us, perhaps reluctantly, into an abstract speculation, is the nature of a military feu, which admits not of a divided succession. When so intangled, we must extricate ourselves the best way we can. A decision must be given, for the competitors are calling out to have justice done them. And however slight the foregoing principle may appear, I must observe, that it had weight enough among our forefathers to preponderate every circumstance which weighs for the elder brother. At least, I will take it for granted, that this is the principle,

principle, till I hear of another capable to make a stronger impression.

And thus a fourth rule came to be established in the succession of military feus, That its course is ever to descend, never to ascend.

To proceed to other matters: I have explained above one effect of bringing land into commerce, which is that of introducing primogeniture into all sorts of holdings. I shall now take notice of other effects of this innovation still more remarkable. The Feudal law was an institution adapted entirely to war, admirably contrived for that end: but it was an utter enemy to labour, and industry, and, even among an indolent people, scarce sufferable in peaceable times. Such an institution could not be long-lived. According to the circumstance of the times, and humours of the people, various changes were introduced in different countries, all of them tending to correct its harshness, and to soften it down to a milder temperament. In many countries it is quite annihilated;
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and even where it remains, it is reduced to a shadow. As land is one of the most desirable objects, the Feudal law was unnatural in this respect, that it withdrew land from commerce, and afforded no means but military service to come at the possession and use of it. The hardship was not much felt in times of war: but after the arts of peace began to be cultivated, manufactures and trade to revive in Europe, and riches to increase, this institution became extremely burdensome. It first tottered, and then fell by its own weight, as wanting a solid foundation. All parties conspired against it, even those who were most interested to support it. Superiors found they could turn their lands to better account, than to allot them for military service. They were willing to change this service for rent; and the tenants, prone to industry, or at least fond of independency, were pleased with the exchange. Other superiors, to supply means for luxury, and tempted with a price, were willing to give off detached pieces of land. And thus, by degrees, land returned to its original condition

tion of being the principal subject of commerce.

This behoved to introduce some new regulations with regard to succession. A man who gets land as a gratuity, or the usufruct of it in name of wages, may reasonably be confined within the strictest bounds. But he who purchases land, and pays a full price, proposes to have it under his own management, and at his own disposal. He proposes, particularly, when he dies, that it shall go to his heirs without limitation. And the person who aliens, supposing him to retain the superiority, finds it his interest to agree to those conditions, since upon that account he gets a greater price for the subject. Perhaps this was not provided for in the first purchases. People who have money to bestow, will take land upon any terms rather than want. But as the appetite for liberty and independency is active and universal, there will always be found purchasers to pay for these conveniencies; and they who stand in need of money, will be tempted to dispose of every thing that
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can procure it. And thus, by degrees, the succession to heirs of line was introduced into feudal rights: that is, collateral succession, properly so called, took place, which was not formerly known.

From this deduction it will be obvious, that, for a considerable time, collateral heirs were admitted to succeed in feus only which were purchased with money, or other valuable consideration. Military feus continued upon their old footing, exclusive of collateral succession. And thus the notion of conquest came in, as opposed to heritage, or what came to the vassal from his ancestors by descent. And, during this period, there certainly was no distinction betwixt *feuda vetera et nova*; but betwixt feus acquired by purchase, which behoved all to be late, and feus granted for military service, which might be either old or new.

When once collateral succession came to be known, it grew into repute, and every person aimed at it. And as bargains of all sorts about land came into practice, the

mixed nature of such bargains, partly for a valuable consideration, partly gratuitous, did quite confound the distinction established betwixt a purchase, and a grant for military service; and so by degrees it crept into the Feudal law, that new acquisitions of land, for whatever cause, descended to heirs of line. And this behoved to introduce a new distinction among feus, *viz. feuda vetera et nova*. Under *feuda nova* were comprehended feus *purchased*, at whatever time, and late feus *granted*, for whatever cause; in all of which collateral succession did obtain. Under *feuda vetera* were comprehended all the old feus granted for military service, which descended to the male heirs only of the original vassal. As these old feus are long ago worn out, this distinction betwixt *feuda vetera et nova* must be at an end. And now, at least in this island, every land-right goes to heirs of line, unless the contrary be specified.

At what periods these several changes in the feudal succession were introduced, is not certainly known. History deals not in
such

such matters; for lawyers are seldom historians, and historians as seldom lawyers. But as we have traces of these distinctions in our law-books, though obscurely handled, the origin of collateral succession, and its several enlargements, follow so naturally the increase of trade and riches, that there is no resisting the conviction which arises from the foregoing deduction. Let us but consider, that once there was no collateral succession in the Feudal law, and that now it is universal, not by statute, but by custom, and we will find the several gradations above mentioned natural and easy; nay, what must necessarily have happened by the progress of arts and sciences, which inspired us not only with a taste for liberty and independency, but made riches flow in among us, wherewithal to purchase these blessings.

Having opened up the origin of collateral succession in the Feudal law, and its progress through various changes, with regard to the subjects in which it did, and does now obtain; I go on to examine who

these collateral heirs are who have a right to succeed.

Let us suppose a second brother makes a purchase of land, and dies without heirs of his body, whereby the succession opens to his collaterals, the question is, Whether the elder or younger brother should be preferred? The principle above laid down favours the younger, That it is natural for heritage to descend, and unnatural that it should ascend. Further, this was become a standard principle, and constantly applied to give preference to the younger brother, in the succession of estates devolved from a father to a middle brother. And it will be observed, that the principle here ought to have the greater effect, as acting without a counterbalance. In the case of heritage, where the estate descends from the common father, we are apt to turn our thoughts upon him, from whence they naturally fall upon his eldest son. This circumstance has no force against the younger brother, in the case of an estate acquired by a middle brother; for the estate being his own conquest,

quest, we are not prompted to look farther back. In a word, if the younger brother be preferred in heritage, notwithstanding a propensity in favour of the eldest, much more ought he to be preferred in conquest, where there is no such propensity against him. Yet, in fact, the elder brother is preferred by all nations who have embraced the Feudal law. And this will not appear strange, when the circumstances of time are attended to. We have a propensity in our nature to act upon general principles, as being easy in their application, by avoiding intricacies, which more abstract reasoning leads us into. The right of primogeniture was but growing into fashion when the rules of succession in heritage were settled, and therefore had not weight enough to counterbalance a natural impulse. But by the time that land came to be a common subject of commerce, the right of primogeniture was established as a general principle, and as the common law of the land. Instances of preferring the younger brother, in the succession of the middle brother's estate, behoved to be rare, in comparison of preferring

preferring the elder brother to the father's estate; and such rare instances making no figure in opposition to the general rule, the right of primogeniture was readily laid hold of to determine this point. And when the error is so common of substituting names for things, it will not surprise us, that this was made the determining rule, though in strict reasoning it meets not the case. After the hint is given, nothing can be more obvious, than that the cause of preferring the eldest son to the father's succession, applies not to the succession of a younger brother.

But we are no sooner extricated out of one labyrinth, than we are involved in a greater. If a third brother dies possessed of conquest, the succession, by the law of Scotland, goes to the immediate elder; by the law of England, to the eldest. Which of these different opinions is best founded on principles, may not be an useless inquiry. The English, who got the start of us in law, have been guided, in the decision, by the principle of primogeniture; and indeed, after conferring the second brother's estate upon
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the eldest, moved by this principle, it was an easy consequence to confer upon him also the third brother's estate. Our people, in the infancy of their law, swayed more by natural feelings, than by general principles, have judged of this matter differently. Beginning at the third brother, whose estate was in question, it has been observed, that the mind, in its progress, passes first to the second brother, and from him to the eldest. In this way the second brother was considered as one step nearer to the deceased than the eldest is, and so was preferred to the succession.

It is probable the Feudal law was introduced into Scotland, before an opportunity offered of fixing this point among the English, otherwise it would have come along to us, with their other feudal customs. Thus we were left to our own way of thinking in solving the problem. And though we have determined the point, by similitude of distance and progressive motion, yet it appears, that some of our lawyers have not always adhered uniformly to this

this resemblance. The learned Craig puts a case, *lib. 2. dig. 15. § ult.* It is of four brothers, three of a former marriage, and one of a latter. The youngest acquires a land-estate, and dies without issue. Our author observes, that other lawyers declared for the immediate elder brother, though of a different marriage; and such, no doubt, at present, is the law of Scotland, whatever difficulty there might be in the question before the rule was established in practice. But he gives his opinion for the eldest brother, “ Because (says he) in the case of
“ different marriages, the connection or
“ conjunction begins at the eldest, and
“ passes through him to the second and
“ third.” This is obscurely said; but it is not difficult to gather what our author had in view. The argument, when brought out to light, is subtle and ingenious. Where the brothers are all closely united by being of the same marriage, we feel an intimate connection among them, without thinking of the connecting principle. But amongst brothers of different marriages, the first idea that presents itself, is rather opposition than
union.

union. This forces us, when we investigate the relation, to begin with the common parent, who is the connecting principle; and as from him the first step is to the eldest son, we conceive this son to be one step nearer than the second, and two steps nearer than the third.

When the matter of succession depends upon such slight feelings, it is not wonderful that the customs of different nations should be so different, and that there should not be any uniform or consistent plan of succession even in the same nation: and indeed our plan, in particular, is far from being uniform. Another mistake has crept into our law, and into all our law-books, less excusable than any above suggested. Let us recollect the distinction mentioned above, betwixt *feuda vetera et nova*. In the first class were the old feus, established upon the footing of military service, where the succession was confined to male descendents of the original vassal, and which consequently behoved gradually to descend, and could never ascend. The other class com-
prehended

prehended purchases, and all late feus, granted for whatever cause, which went to heirs of line. In these, when the succession opened to collaterals of the original vassal, the eldest brother and his descendants were preferred as the heirs of line. It is mighty plain, that these *feuda nova* could never become *feuda vetera* in any course of time, so as to exclude collateral succession, or to bar succession by ascent. If conquest go to the elder brother, where the purchaser, a middle brother, dies without issue, no imaginable reason can be given why it ought not to go in the same channel, where the purchaser leaves a son who succeeds, and dies without issue. In one word, collateral succession, and succession by ascent, ought to be convertible terms; if in any one case the eldest brother is the lineal heir, he ought to be considered as such in every case of collateral succession. But these matters first took footing in the days of ignorance, when the conceptions of mankind were gross and inaccurate. What it may be in other countries, I know not, but in the practice of
Scotland

Scotland a very motely system is established. We conceive nothing to be a *feudum novum*, but an immediate purchase. If it have once passed by succession, we understand it to be a *feudum antiquum*, or heritage; not so indeed as to exclude collateral succession, but so as to make the succession for ever after to descend, and never to ascend. And we have been led into this practice by an error, apt, as above observed, to slip into all sorts of reasoning; which is that of mistaking words for things. Not attending to the import of the distinction betwixt *feudum antiquum et novum*, we took up with the word, and deserted the meaning; and so by degrees came to conceive every old feu to be *feudum antiquum*. And as there are no precise boundaries betwixt what is old and what is new, we were forced, at last, to fix upon the following rule, That whatever has passed by succession, is to be understood a *feudum antiquum*. Having once introduced this arbitrary distinction, in place of the former, we unwarily applied to it those general rules which apply only to the original distinction betwixt *feudum an-*

tiquum et novum. Nothing can be more gross: in place of the proper distinction betwixt *feudum antiquum et novum*, to substitute another of a quite different nature, that has no relation to it but the name; and yet to mistake this new-invented distinction for the old, so as to give it the same effect in law, was certainly confounding things in a strange manner, and what could only happen in the days of ignorance. It is very true, that we proceeded no farther than to exclude the privilege of primogeniture, where a feu had once been taken up by succession. We never considered it to be a *feudum antiquum* in any such proper sense, as to exclude collateral succession. False reasoning could scarce lead us so far. In judging of a nice case, such as the competition betwixt two brothers, we might be led to substitute one idea for another, the *feudum antiquum* for the *feudum novum*; especially if the dispute happened about a feu that was really old, or of a long standing. But, in a dispute betwixt the heir of the vassal and the superior, where the question behoved to turn upon a point of fact, Whether the
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the feu was granted after the period that all grants of this kind were understood to go to heirs of line? it was scarce possible that any mistake should happen.

And now, to explain the terms of *beir of conquest* and *beir of line*, let us suppose a *feudum novum* and a *feudum antiquum*, properly so called, centered both in a middle brother: the last, it is plain, cannot be, but by a destination excluding the eldest brother. Or let us suppose them both to be *feuda nova*, the one purchased by the second brother himself, the other established in his person by virtue of a destination. Or, conformable to our present practice, let the one be a purchase, the other a subject to which he derives right, as representing a younger brother. The eldest brother will succeed in the land purchased by the middle brother, the younger will succeed in the land that came to the middle brother by succession. And in this manner it may often happen, that the same person's succession is split and divided betwixt two male representatives, the one named *the beir of line*, the other

the heir of conquest. These names are used in the particular case only, where both represent the same person. In other cases, where there is no occasion to make the distinction, they pass under the common appellation of *heirs at law*. For example, an eldest son succeeding to land purchased by his father, is not styled *heir of conquest*, but *heir at law*, or *of line*. But with regard to this, though the elder brother is named *heir of conquest*, in opposition to the younger, who has the name of *heir of line*, we must beware not to consider the heir of conquest as a limited heir. It is certain he is *eadem persona cum defuncto*, and an universal representative, equally with the heir of line properly so called. So says the Lord Stair, *tit. Heirs, § 10.* And he assigns a very ingenious reason for giving to the younger brother the title of *heir of line*. “The elder brother (says he) is
“ called *the heir of conquest*, and the other
“ retaineth the common name of *the heir*
“ *of line;*” which is saying, that the younger brother is allowed to retain a name com-
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mon to both, for want of another term to distinguish him by.

Touching heirship-moveables, tacks, pensions, or other such rights from which the executor is excluded, and which, properly speaking, are not land-rights; it is settled in practice, that these go all to the heir of line, and not to the heir of conquest. The foundation of this practice may be readily guessed. Let us recall what is observed above, that the right of primogeniture, confined at first to military feus, was gradually extended to take place in the succession of males, whatever was the nature of the feu. But as there had been no example of the right of primogeniture in the succession of females, our forefathers did not think of carrying this right beyond the practice, and so confined it to the male succession. The same has happened here. The privilege of primogeniture had taken place in succession to land only; and as there was no example or authority to determine the point touching the subjects now in question, natural

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feelings

feelings prevailed, and the propensity to pass downwards, or according to the succession of time.

P A R T II.

IN order to accomplish the task we have undertaken, it will be necessary to take a view of the transmission of moveables from the dead to the living, and of the different changes this species of succession has undergone in Britain.

Histories of all the later ages are filled with the incroachments of the Roman clergy. There is no end of the artifices used by them to usurp power and riches. It appears strange, that by all the historians who write with great spirit against them, one of their most successful stratagems to ingross money should be overlooked. And yet this is so true, that we are entirely indebted to our statute-book, for keeping in memory one of the most notorious instances of
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of priestcraft ever was practised. Would any one believe, that there is a country, and in Europe too, where the clergy once gained such an ascendant over the minds of the people, as that the moveable estate of every man who died intestate was tamely suffered to be swallowed up by that rapacious body? Those who draw their notions from the present age, will scarce believe, that superstition could ever be so prevalent, as to produce a law preferring the bishop to the next of kin. But let them suspend their wonder for a moment, till they learn the whole extent of this law. It did not stop at excluding the relations of the deceased, even supposing them to be his children. The wife was excluded. Nay the creditors were excluded. All was given to the bishop *per aversionem*. Of Britain we are talking, and yet the shameless rapacity was suffered here for ages. We may believe such a monstrous practice could not be established at once. It crept in by degrees. The foundation was laid in a doctrine sedulously inculcated, That the moveable effects of every man deceased, failing his own appointment,

pointment, ought to be laid out for promoting the good of his soul. This brought the clergy into play. The Ordinary at first pretended to give advice only; but this advice, in process of time, gained authority, and became a command. At last the mask was thrown off, and the Ordinary, without ceremony, took possession, not deigning to account to any mortal. Let us hear a grave author* upon this subject:

“ Originally the goods of the intestate passed by a kind of descent to the children; afterwards, by a Saxon law, the wife had her part. In Henry I.’s time, the clergy had gotten a taste: for although the wife and children, or next of kin, had then the possession; yet it was for the good of the soul of the deceased; and the Ordinary had a directing power therein, and was in the nature of an overseer, and somewhat more. Afterwards, in the time of King John, the clergy had drawn blood; for though the possession was as

* Bacon’s Discourse of the laws and government of England, *part* I. *cap.* 66.

“ formerly,

“ formerly, yet the dividend must be
“ made in the view of the church ; and by
“ this means the dividers were but mere
“ instruments, and the right was vanished
“ into the clouds. But in Henry III.’s
“ time, the clergy had not only gotten the
“ game, but gorged it : both right and pos-
“ session was now become theirs, and
“ wrong done to none but the clouds.”

And so it came to be settled *, That if a man died intestate, neither his wife, children, nor next of kin, had right to any share of his estate ; but the Ordinary was to distribute it, according to his conscience, to pious uses : and sometimes the wife and children might be amongst the number of those whom he appointed to receive it ; but he was, however, under no restraint ; the law trusted him with the whole disposition.

The first statute that limited the power of the Ordinary was 13th Edward I. c. 19.

* New Abridgement of the law, tit. *Executors and administrators*, p. 398.

by which it is enacted, “ That where a
“ man dies intestate, and in debt, and the
“ goods come to the Ordinary to be dispo-
“ sed, he shall satisfy the debts so far as
“ the goods extend, in such sort as the ex-
“ ecutors of such person should have done,
“ in case he had made a will.” After-
wards the possession was taken from the
Ordinary, by obliging him to give a depu-
tation *to the next and most lawful friends
of the intestate, for administering his
goods*; 31st Edward III. *cap.* 11. But this
statute was not a sufficient bar to the avarice
of the clergy. Means were contrived to
evade it, by preferring such of the in-
testate’s relations who were willing to offer
the best terms. This corrupt practice was
suffered to the days of Henry VIII. when
the clergy losing ground, the statute 21st
Henry VIII. *cap.* 5. was enacted, bearing,
“ That in case any person die intestate, or
“ the executors refuse to prove the testa-
“ ment, the Ordinary shall grant admini-
“ stration to the widow, or to the next of
“ kin, or to both, taking surety for true
“ administration.”

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This statute, as it ascertains the persons who are intitled to have letters of administration, without leaving any choice to the Ordinary, was certainly intended to prevent his making gain of the effects of persons dying intestate. But the church doth not easily quit its hold: Means were contrived to evade this law also. Though by these statutes the possession was wrested out of the hands of the Ordinary, yet his pretensions subsisted entire, of calling the administrator to account, and obliging him or her to distribute the effects to pious uses. This was an admirable engine in the hands of a churchman for squeezing money. We may readily believe, that the administrator who gave any considerable share to the bishop, to be laid out by him, without doubt, upon pious uses, would not find much difficulty in making his account. It was probably this rank abuse, which moved the judges of England solemnly to resolve, That the Ordinary, after administration granted by him, cannot compel the administrator to make distribution *. But at last the right of

* Last mentioned author, p. 414.

the next of kin was fully established, by statute 22d and 23d *Car. II. cap. 10.* which enacts, That after payment of debts, funerals, and just expences of all sorts, the surplufage fhall be distributed as follows:
“ One third to the wife of the inteflate; the
“ refidue amongst the children, and fuch as
“ legally represent them, if any of them
“ be dead. If there be no children, nor
“ legal representatives of them, one moiety
“ fhall be allotted to the wife, the refidue
“ equally to the next of kin to the inteflate
“ in equal degree, and thofe who repre-
“ sent them. But no representation fhall
“ be admitted amongst collaterals, after
“ brothers and fifters children. And if
“ there be no wife, all fhall be distribute
“ amongst the children; and if no child,
“ to the next of kin to the inteflate in
“ equal degree, and their representatives.”

We may reasonably conjecture, that the church was equally fuccefsful in both parts of the ifland. It is indeed laid down in the *Regiam Majestatem, l. 2. cap. 37.* That the wife and children are each of them in-
titled

titled to a third share of the moveables, and that when a man makes his testament, he has no power of disposal but of the remaining third part ; which therefore is called the dead's part. And this also appears to have been the law of England, *Fleta, l. 2. cap. 57. § 10.* But however plausible the inference may appear, it does not in fact hold, that the Ordinary, in distributing the goods of one who died intestate, was limited, in the same manner as the proprietor himself was, in making his testament. In England, as above observed, though the wife and children had a legal claim, which could not be disappointed by testament ; yet such was the authority and influence of the church, that the Ordinary was laid under no such restraint. In distributing the effects of an intestate, he was subjected to no law, but that of his own conscience. Even creditors had no legal claim till it was given them by statute. The case was the same in Scotland ; for which we need no other authority than the statutes of King William, *cap. 22.* subjecting the Ordinary to pay the debts of the deceased, to the extent of

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his moveables. If before that time the creditors had not a legal claim, the wife, children, and next of kin, could have none. This defect, however, was not by the wife and children severely felt; as the Ordinary seldom ventured to defraud them of their legal share. In a provincial council of the Scotch clergy, held *anno* 1420, recorded in Wilkin's *Concilia Mag. Brit.* vol. 3. p. 397. it is laid down as the established practice, That the goods of those who die intestate, are divided into three shares; one to the wife, another to the children, and a third, called *the dead's part*, which last paid to the bishop a shilling of the pound, in name of *quot.*

But with regard to the dead's part, the Ordinary took more liberty. It was thought sufficient, that a man had it in his power, to settle by will this portion of his effects. If he made no will, it was understood to be his intention, that the Ordinary should have the sole management and distribution; and it was thought no intolerable hardship, that the church should have this power, when
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it appeared to proceed from the presumed will of the deceased. But cases occurring, of persons under age dying before they were capable to make a testament; which left their next of kin without remedy, as they had not an action at common law against the executors dative, to oblige them to account; this was thought a grievance; to remedy which, the act 20. parl. 1540, was made. The preamble is, That “where-
 “ as persons often dying young, who cannot make a testament, the executor named by the Ordinary, does notwithstanding intromit with the whole goods, and withdraws the same from the nearest of kin, who should have the same by law;” therefore enacted, “That where any person dies within age, who cannot make a testament, their next of kin shall have their goods; without prejudice to the Ordinary’s claim of a *quot.*” But it is to be observed, that the remedy here given to the next of kin, is far from being general, to afford them a claim against the executor in all cases. The statute takes

place only where a person dies so young as not to be *testamenti capax*.

This was a happy commencement, however, and was productive of other improvements. One article of the instructions given to the commissaries *anno* 1563, is, “ That if one die intestate, or his executor
“ nominate refuse to accept of the office,
“ the commissaries must give the office to
“ the nearest of kin, being willing to find
“ caution.” This is copied from the above-mentioned statute of Henry VIII. enacted a few years before. But the regulation had still a better effect in Scotland than in England. It required a statute there to complete the right of the next of kin, and to give them a legal footing to support their natural claim against the incroachments of the church: but in Scotland, Episcopacy being abolished soon after the reformation, and the bishops, immediately upon the reformation, having lost all civil jurisdiction, the next of kin confirmed executors, were intitled of course to retain the free effects.

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The bishop had lost his claim, and the commissaries never had any.

It is observable, that in the foregoing articles of the instructions 1563, no mention is made of the widow, though her interest is expressly taken care of in the English statute, whence the article is copied. This could not have happened by inadvertency. My conjecture is, That our judges have taken the honest liberty to sustain action against the Ordinaries, to the widow for her third, and to the children for their legitim, in imitation of King William's statute, affording action to creditors. Nor was this a great stretch; for if by established practice it was understood to be the duty of the Ordinary, in distributing the goods of an intestate, to give a proportion to the wife and children, as mentioned above; it was natural for the civil court to interpose by an action, if the Ordinary transgressed his duty: and if a legal claim was afforded to the wife and children, by the courts of law, it was unnecessary to take any notice of them in the instructions 1563. Our judges indeed

must have been extremely scrupulous, had they denied this remedy to the wife and children, considering, that by the common law of the land, the wife and children had an unexceptionable claim against the executor nominate. And it might well be thought strange, and unaccountable, that a man should have it in his power to defraud his wife and children of their just claim, by forbearing to make a will, or that the Ordinary should not be liable as well as the executor nominate.

But to return to the next of kin, who were now advanced one step by the foresaid instructions, which provides for them where there is no testament: it will be observed, that they were still left without remedy, where a testament was made, unless it was made in their favour. They had no privilege hitherto, save that of being preferred to the office of executry. But this privilege could not take place against an executor named by the testator; nor had they any action at common law to oblige the executor nominate to account. It was understood

understood the testator's will, that the distribution should be left to the discretion of the executor, where the contrary was not expressed; just as formerly it was understood to be his will, to leave all to the discretion of the Ordinary, where he died intestate. And thus it happened, that the very nomination intitled the executor to retain to himself the free moveables, even where he was not named universal legatar. This was remedied by the act 14. parl. 1617, which gives to the next of kin the like action against the executor nominate, to account for the defunct's effects, that formerly lay against him at the instance of the wife and children.

There is, perhaps, not upon record a stronger instance of the power, as well as rapacity of the Romish clergy, than what we have now under consideration. Such were the steps taken by our forefathers, to rectify this abuse, and to restore the law of nature. But no total remedy was hitherto provided: there still remained cases in which the next of kin had no claim. If, for example,

example, the next of kin were infants, or perhaps abroad, so as to have no opportunity to apply for confirmation, no action lay at their instance against the procurator-fiscal, nor against any other, upon whom the office of executor was bestowed by the commissaries. It is true, that upon the foundation of the above-mentioned instructions 1563, the next of kin might have access to annul such nomination by the commissaries, if they could excuse their absence, and show, that they were prevented from applying for the office. But, at any rate, this remedy would come too late, after the goods were distributed. This defect was supplied by the authority of Oliver Cromwel. For, in the *orders for regulating the prices and proceedings in the sheriff and commissary courts, by the commissioners for administration of justice to the people in Scotland, dated the 14th January 1654*, it is enacted, article 15. “ That
“ whoever shall obtain themselves execu-
“ tors-dative, confirmed to any defunct,
“ shall be liable to the wife and nearest of
“ kin for their respective portions of the
“ free

“ free goods in testament, by an immedi-
 “ ate ordinary action ; without necessity to
 “ reduce the former testament, or to ob-
 “ tain themselves executors to the defunct.”

And that this regulation supported itself by
 its intrinsic equity, notwithstanding the de-
 fect of lawful authority, is vouched by the
 preamble of the act of sederunt, 14th
 November 1679, premising, as a thing in-
 cumbent upon all executors, by virtue of
 their office, “ That they should execute
 “ the testament of the defunct, by recover-
 “ ing his goods, and obtaining payment
 “ of the debts owing to him, for behoof
 “ and interest of the relict, children, or
 “ *nearest of kin*, creditors, and legatars of
 “ the defunct.”

From this short history of the trans-
 mission of moveables from the dead to the
 living, it will be evident, that there is no
 such thing, properly speaking, in the com-
 mon law of this island, as an heir *in mobi-*
libus. If a will be made, the form of it is,
 to name an executor or trustee to distribute
 the effects, according to the will of the
 testator,

testator, if expressed; and if not expressed, according to established rules. According to this form, there is no place for the succession of an heir; and until a late regulation, by and by to be mentioned, as little was there place for this succession, where no will was made. If a person died intestate, the whole moveable effects were *eo ipso* vested in the Ordinary, or, in place of him, the commissaries, in Scotland; not in the quality of heirs, but as trustees to distribute the effects to pious uses. Accordingly no person was legally intitled to take possession of an intestate's effects, otherwise than by an express warrant from the Ordinary or commissaries. And after the restoration, the bishops in Scotland took great care to preserve their right. They had spies in all corners; and no sooner was a man laid in his grave, than they thundered out all the artillery of law, to force his relations to apply for letters of administration. This grievance, among others, was redressed after the revolution. What was suffered with impatience under the jurisdiction of bishops, was not at all to be endured

endured under the jurisdiction of their shadow, the commissaries. Accordingly a statute was made, act 26. parl. 1690, discharging such prosecutions in time coming: “ That no person shall be bound to give
 “ up inventory of a defunct’s goods ; and
 “ that there shall be no confirmation, unless at the instance of the relict, children, nearest of kin, or creditors.” It was the intention of our legislature, by this statute, though not said expressly, to transfer to the children or next of kin, the property of the moveables which belonged to the deceased, without requiring any other act or solemnity, but barely apprehending the possession. This will be obvious, from considering, that, by the common law, there is no other form known, of acquiring the property of moveables which belonged to a deceased person, but by warrant of the Ordinary or commissaries. And when this form is dispensed with, without substituting any other, possession alone must have the effect. It is true, confirmation is not altogether laid aside ; it is still of use to preserve the possessor from
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being liable to creditors beyond the value of the subject. But if the children or next of kin are willing to subject themselves to this risk, they may take possession, without confirming. And thus, after much wandering, the transmission of moveables from the dead to the living is restored to its natural channel: for with respect to those, at least, who die intestate, their moveables are now transmitted by succession; and so far it may be said properly, that we have an heir to the personal estate, as well as to that which is real.

It remains only to be observed, that though in England the *jus representationis* is introduced to a certain extent, in the succession of moveables *ab intestato*, we have not thought proper to follow this practice. We adhere strictly to the law of nature in moveable succession, by preferring the next of blood, without distinction betwixt male and female, and without regard to the privilege of primogeniture.

A P P E N .

A P P E N D I X.

U P O N

THE HEREDITARY AND INDEFEASIBLE RIGHT OF KINGS.

THE hereditary indefeasible right of kings, and passive-obedience and non-resistance its genuine offspring, are doctrines which of late have made a great noise in Europe, and particularly in this island. Some reflections upon this subject, suggested by the present unhappy times, will make a proper appendix to the essay immediately foregoing.

When we consider man abstracted from all positive engagements, we find nothing in his nature, or in his situation, that subjects him to the power of any, his creator, and his parents, excepted. The parental power is at an end, when children, grown up, can provide for themselves. At any rate, the parental power cannot subsist longer than the life of the parents; for it depends on

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personal circumstances, and is not a matter of property to be transmitted by succession. And supposing it a subject to be taken by succession, it must descend to all the children equally, at least to all the sons equally; for primogeniture, it is certain, is not a privilege of the law of nature, but only of the Feudal law. Hence it is a principle embraced by the most solid writers, That all men are born free, and independent one of another.

Man indeed is fitted for society. His wants prompt him to it, and his inclinations render it agreeable. Accordingly we find mankind almost every where parceled out into societies, which, by accidental circumstances, have been originally formed, more or less extensive. A society of any extent cannot be without government. The members must have laws to determine their differences, and they must have rulers to put these laws in execution. At the same time, we find the constitutions of different states, with regard to government, almost as various, as are the sentiments of men concerning

concerning it: And though government be necessary to the well-being of society, yet, from the foregoing consideration alone, were we to look no farther back, we may conclude, that no particular form is necessary, but that all are the effects of choice, or perhaps in some measure of natural causes.

Let us trace this matter farther, because it is of importance. Man is a shy animal, and in his original state, rather averse to society. In this state his wants are few, and easily supplied; and we may readily conclude, that while acorns were the food of man, and water his drink, there was neither use nor appetite for society. Accordingly, we find men originally in every corner of the earth, living in scattered habitations, with little intercourse, except among the members of the same family. The culture of corn laid the foundation of a more extensive intercourse, because thereby mutual assistance became necessary. When arts were invented, and industry increased, it was found convenient to herd

together in towns and villages. From this near connection one evil sprung, opposition of interests, formerly rare; which at first was the occasion of quarrels and bloodshed, and afterwards of frequent appeals to men of weight and probity. The necessity of fixed judges to determine differences being discovered, the election of these judges, which could not otherwise be than popular, was the first step to government. The chief magistrate therefore was originally no more but the chief judge, whose powers were gradually unfolded, as cases occurred which required the interposition of a superior or governor. War introduced slavery, as it subjected those taken in battle, to the arbitrary will of their conquerors; and absolute power was too desirable an acquisition, to be confined to private persons. The chief magistrate, however repugnant it be to the nature of his office, did often grasp at it: And history informs us, that the chief magistrate, in different societies, was often too successful. In a word, absolute independence and absolute power are the two extremes; and the

the latter, at least so far as concerns sovereignty, could never have been introduced, but by passing through all the intermediate degrees.

Government is one of the arts which necessity hath suggested, which time and experience have ripened, and which is susceptible of improvements without end. It must also be the privilege of every society to improve upon its government, as well as upon manufactures, husbandry, or other art invented for their good. No particular form therefore can be essential, as no particular form is preferable to another, unless by having a greater tendency to promote its end, the good of the society. Comparing democracy, aristocracy, and monarchy together, this is their common standard.

There is a people inhabiting the earth, who are not left to the choice of their governors, but are by nature subjected to monarchy. This people is distributed into different societies, and in each there is a

royal family, of a distinct species from the other members. Every monarch is born with marks of royalty, of a peculiar shape, and with superior beauty. We may infer, that the excellencies of the mind are not inferior to those of the body; and it is not wonderful, in such a case, that perfect obedience should be universal in that state, and that the monarch's will should be the only law. Here the parts are finely adjusted to each other, the sovereign framed for command, as the subjects for obedience; each in their several capacities equally contributing to the sole end of government, the well-being of the society. The monarch, taught by nature, that the sovereign power is a trust which ought not to be abused, has no desire other than to promote the public welfare. The people, taught by nature, that passive obedience and non-resistance are the means to promote their happiness, implicitly submit themselves to their monarch's will.

Were mankind so framed, for of a species of insects we have been speaking, those gentlemen

gentlemen would have reason on their side, who declare so strongly for indefeasible hereditary right, and the reciprocal duty of passive obedience and non-resistance. Were the royal family in every society, like that of the bees, distinguished from the mass of the people, by superior excellencies, whether of mind or body; were they unerringly prompted by nature to exercise their power for the welfare of the society; blind obedience to their will would be a virtue. But when we trust with sovereign power, one of the common stamp of mankind, who has by nature no marks of royalty, and who, perhaps, by nature has not talents for government, the absurdity is great, to maintain, that this person ought to be under no control; and that we ought to continue to trust him, after repeated instances of betraying his trust.

I have no occasion to consider, whether, by the law of nature, conquest be a good title to acquire the absolute dominion of a state, as in Turkey, where the Grand Signior is supposed to be lord of the manor,
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and all the people his slaves. This is not government, the characteristic of which is, trust reposed in one for the good of the whole. It is like a private estate, which may be disposed of by the proprietor without control, and applied for his own purposes. It cannot be pretended that the King of Britain has his right by conquest; and therefore no support can be brought to the argument from that quarter.

The system, I yield, is so far consistent, that if we suppose the king's right indefeasible, and that he cannot be deprived of his authority, however much his measures swerve from the rules of good government, it must follow, that the people are tied to passive obedience and non-resistance, as there is no *medium* betwixt resistance and obedience. But where is the foundation of the indefeasible right of the king, more than of any other officer of the state? Doth it lie in the name? One should scarce think so, when the name is applied indifferently to governors of great and of little power. It cannot lie in the nature
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of the office, which being a trust, is undoubtedly forfeitable upon maleadministration. It will perhaps be said to lie in the constitution of our government. So far from it, that no man is bound to obey the king's commands, unless delivered in a certain form prescribed by law. And even in France, supposing it an absolute monarchy without any constitutional check upon the king's actions, the king's power is notwithstanding limited. There cannot be such a thing in law, as a voluntary surrender of the liberties of a people to the arbitrary will of any man. The act would be void, as inconsistent with the great law of nature, *Salus populi suprema lex.*

But the favourers of this doctrine, when beat out of these intrenchments, have a retreat, which they suppose impregnable. They are forced to admit that the king may do wrong, by betraying the trust reposed in him: But then they maintain, that a king having no superior on earth, can have no proper judge of his actions but God alone, from whom his power flows; and therefore

fore is accountable to none but the Almighty. This is a fortress built upon sand. All power, no doubt, is from God, natural and legal; for he is the creator and upholder of all things. But it follows from this, instead of being contradictory to it, that every sort of power is limited by the opposition of other powers, natural or legal, which are equally from God with the power resisted. Perhaps they mean, that every king has his commission from the Almighty, and not from the people. History alone may suffice to inform us, that this cannot be, when there have existed so many kings unworthy of command. But supposing the fact, it follows not, that this commission is unlimited. On the contrary, it must be limited; for who can patronize so impious a doctrine, as that God will give a commission to any being, to plague and persecute mankind, unless for their sins? The voice of nature is the voice of God; and it is a fixed principle in the law of nature, That where there is no common judge to appeal to, the party injured may do himself justice. The laws are superior

perior to the king, and these he must be judged by. And supposing an absolute government in the strictest sense, where the king's will is law; yet there is always one law above him, which is that of self-preservation. If his actions generally tend to destruction, instead of government, the people, who have no judge to appeal to, may lawfully do themselves right: *Salus populi est suprema lex.*

But after all, where is the necessity of God's extraordinary interposition, by granting his immediate commission to kings, when in other matters he chuses to govern the world by second causes and ordinary means? Why should we suppose, that mankind are deprived of their natural privilege of chusing their first magistrate, more than of chusing those that are subordinate? Where is this commission recorded? Is it given to all rulers who have the name of *King*, or are some nations peculiarly honoured? Is it given to all sovereigns in general, whether honoured with the name of *King* or not? Was this commission given to all the
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crown-vassals in France, dukes, earls, Barons, who usurped, and for many ages, possessed a sort of sovereignty within their own territories ? These are puzzling questions, and it would require an express revelation to put an end to them. In behalf of the legislative power, though superior to that of the king, no peculiar interposition of Providence is pretended. This body is left to be modelled by choice or by accident. The government of the world is after this manner carried on ; and yet nothing happens, we may presume, contradictory to the original plan of Providence. Why then a peculiar Providence in behalf of kings, or an immediate revelation, when there appears to be no necessity ? We cannot, without impiety, admit of the supposition, when, so far as weak man can conjecture about the operations of the Almighty, he never interposes by extraordinary means, unless where the ordinary dispensations of Providence prove insufficient to answer his purposes. We may therefore conclude, with the highest degree of assurance, that kings have no other commission

sion from God, but what is enjoyed by every magistrate, supreme and subordinate, who is legally elected according to the standing rules of the society to which he belongs.

But doubts and difficulties multiply upon us. Were we, by a revelation from heaven, made acquainted with the names of all those nations, which, like the Jews of old, are to be governed by magistrates of God's express appointment; and were we, by the same means, made acquainted with the families who are to bear his commission; the revelation would still be imperfect. It is not enough to ascertain the family; the rules of succession must also be ascertained, that there be no dispute about the individuals who are to enjoy this heaven-descended privilege. Here, without a new revelation, we are left in a great measure at an uncertainty: For are we to follow the rules of England or of France? Are we to be guided by the law as at present established, or as it was three centuries ago? Whatever rules be followed, we must

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be sensible they are in a great measure arbitrary, the offspring of accident, or of the slenderest feelings of the imagination, and established by custom only. Has not this a strong appearance of leaving to every nation the choice of their own magistrates? Kings were at first chosen for life. It crept into practice to make all public offices hereditary; and the sovereign power has generally come to be hereditary, partly from inclination, and partly to avoid the inconveniencies of an elective monarchy. But after what manner is this hereditary right of kings carried on? Not by any universal law, expressly revealed, or stamped on the nature of man; so far from it, that the rules of succession differ in every country, being established by custom alone, or, in other words, by the consent of the people. In France, for example, the females are totally excluded. Have females by the appointment of the Almighty this indefeasible right of succession? If they have, France for many ages has been in a damnable error. If not, the load of the guilt must lie upon England, and upon many other countries

countries who admit of female succession. This dilemma cannot, I think, be evaded, otherwise than by fairly acknowledging, that God, in this matter, as well as in others, works by second causes without any direct interposition; leaving every nation to be governed by laws of their own appointment. And indeed nothing is more absurd, than to suppose, that hereditary monarchy is the indispensable appointment of the Almighty, unless, by infallible marks, the persons could be ascertained who are to enjoy this extraordinary privilege: for this would be to command us, under pain of damnation, to give entire submission to persons, as rulers appointed by the Almighty, without revealing who these persons are.

Another inference may be drawn from the doubtfulness of the law of succession. It is a self-evident proposition, That no right can be stronger than the title upon which it is founded. No title is more slender, in most instances, than that of succession. How then can it be maintained, that the hereditary right of kings is indefeasible, when the

title upon which the right is founded, is so weak and so arbitrary. I think we may with certainty conclude, that such a right must, upon every occasion, give place to the primary rights of nature, such as tend to our preservation and well-being: and therefore that any particular heir may be safely set aside, when he becomes dangerous to the society. For it is assuredly the voice of God, That in every conflict the weaker right must yield to the stronger. Nay, we may go one step farther, that if the good of the society can be more promoted by a different form of government, hereditary right may be laid aside altogether, without any crime; since the good of the society is an object of much greater importance than the right of any individual can be.

Touching the family of Stuart, no right has less the air of divine authority than what they had to the crown of Britain. To look no farther back than to the competition betwixt Bruce and Baliol, which, in those days, appeared, and truly was an intricate affair: Was Baliol a king by divine appointment, when

when his only title was an award given by Edward of England, who is shrewdly suspected to have been swayed more by political considerations, than by justice and equity? Unhappy is the condition of that people, who are bound to make a right choice of God's vicegerent, under the pain of damnation, and yet have no better authority to direct their choice, than such an award. It will be said, that the right was with Baliol. But how the patrons of the divine right of kings should come to a certainty in this matter, I am at a loss to understand. For, not to mention the pretensions of his competitor Bruce, it is perhaps not extremely clear, that a female has any divine right to a crown; at least there is no instance of this among the Jews. And if females be admitted, I cannot see why the kingdom ought not to be split among female heirs, as well as a private estate. If right to a crown be considered as a matter of property, there certainly ought to be no difference. But rejecting by the lump all difficulties, and supposing Baliol's right of primogeniture to be the divine law, it is plain, Robert Bruce could have

no divine right, nor can the Stuarts have a divine right, who derive their right from him. It is but a mean subterfuge, That none of Baliol's race appear to claim the crown. Will it be said, that this nation continued in an obstinate course of rebellion against the King of heaven, so long as any of Baliol's race existed? How do we know they do not at present exist? It is our indispensable duty to search for the king whom God has given us, through every corner of the earth. It is equally our duty to refuse our obedience to an usurper; and he must be so, who has not a hereditary right, and consequently is not of God's appointment. Let us keep in view, that prescription, positive or negative, can avail nothing, which has no other foundation but universal consent, implied from a long acquiescence.

The asserters of this divine right dare not yield, that Baliol forfeited the crown of Scotland, by acknowledging himself vassal to the King of England; for this would be justifying the late revolution in
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every point. Making an independent kingdom a fief of another sovereignty, is not more subversive of the constitution, than the measures are, which were pursued by James VII. during the whole course of his reign. And if the people of Scotland could lawfully judge, that Baliol had subverted the constitution, and upon that judgement could transfer the crown to another; the people of Britain had the same title to give judgement against James VII. and to declare that he had forfeited the crown.

With regard to England, the pretext of a divine right is still more lame, if possible. William the Conqueror was a bastard, and could have no divine right to the dukedom of Normandy; nor did he himself pretend any other right to the crown of England, than by the testament of Edward the Confessor. But supposing him to have conquered England, which will not be admitted, he certainly did not conquer his Norman subjects who came over with him to England, and from whom, for ought we know, a great part of the nation are descended. The
Stuarts,

Stuarts, therefore, who have no other claim to the crown of England, but by a female connection with the race of William the Conqueror, cannot, with any shadow of reason, insist upon their beloved doctrine of a divine right, so far as concerns the English who are of Norman extraction.

Upon the whole, supposing the hereditary right of kings to be the appointment of God, indefeasible and indispenfable, the following points ought to be ascertained :
1st, Whether this law be universal, to take place over the whole earth ; or if it be limited to certain nations ; and what these nations are ? *2^d*, To what particular families does this divine right belong ? *3^d*, The rules of fucceffion, which concern these particular families, ought to be distinct and perfpicuous, fo as to procure a universal agreement, as about the primary laws of nature. *4th*, These rules ought to be innate, and the transgression of them be attended with the strongest sense of immorality, like treachery or murder. Were these points thoroughly cleared, the system
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might be consistent: but, as it stands, it is attended with doubts and darkness, to lead every honest heart who espouses it, into endless perplexities.

Modern histories are filled with evils occasioned by disputed successions: they are also filled with evils occasioned by contests about the king's prerogative. There can be no moderation in such controversies, where the Almighty is made a party, and every person termed *impious* who takes the opposite side. Hereby it comes, that this doctrine of hereditary indefeasible right in kings, seldom fails to break the peace of society, to foster inveterate enmities, and to be the source of endless wars; of which, were there no other evidence, the present times afford a deplorable instance. Were we to assign any parent to this doctrine, other than blind enthusiasm, we can never ascribe it to a good being. And, indeed, the devil himself could not more effectually distress mankind than by propagating such a poisonous opinion. Plague and famine are nothing to it.

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But though the doctrine merits no quarter, I would not be so severe upon its votaries. I am sensible, the farther removed any opinion is from truth, the greater, in proportion, is the difficulty of conversion. It is like love to an ugly woman, which is ever in extreme. The Jacobites, such as are not of desperate fortunes, are in some measure pardonable, even while they are laying waste their country by intestine commotions. When they venture their lives and fortunes in the service of their idol-prince, it ought to be presumed, that they are deluded by a mistaken principle of duty, not interest; because their prospect of success can never balance the hazard. What pity it is they were not engaged in a better cause? But if nothing else will open their eyes, ought it not to have some effect, that there is nothing more repugnant to the laws which govern all societies, than for any single man, or set of men, to force their opinions upon the majority. How would they relish the behaviour of a member of their own parliament, who should endeavour, by force
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of arms, to oblige the whole body to submit to his sentiment? Or how would they relish a body of men rising in arms, upon no better pretext, than obtaining justice to a friend, whom they suppose to be unjustly condemned by the whole body of judges? Is it not an excuse commonly given by *banditti*, for robbing on the highway, that they are but making reprisals, because of goods unjustly wrested from them by authority of law? Yet this is precisely the present case. The late King James was set aside by the sovereign authority of the nation, that is, by the act of the majority, who, from the very nature of society, must be the ultimate judges, in all matters which concern their preservation and well-being. Perhaps he was unjustly condemned. Be it so, for argument's sake. But an ultimate judgement must lie somewhere, without appeal. It must be a fundamental law in all societies, to acquiesce in this ultimate judgement, right or wrong, without which concord cannot be preserved, even for a moment. No honest remedy after this can remain, but to desert the society, and to
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join some other, where the rules of justice are supposed to be better observed. Can it be thought, that the right of any man in a society, supposing him a chief magistrate, trusted with the greatest powers, is superior to the fundamental laws of the society, whence he derives this right? It is an absurdity, the same as, that a part is greater than the whole. It were to be wished, that those gentlemen would seriously consider this matter, who are so strenuous for the claim of an abdicated king, and who would embroil heaven and earth to compass the restoration of the family. And would they but allow themselves to think, with any degree of coolness, they would soon be convinced, that the peace of society is an object of greater importance than the right of any single man can be, supposing him descended from a thousand kings.

F I N I S.

Kames, Henry Home

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